

# San Francisco Law Library

436 CITY HALL

No. 144107

---


## EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.





Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov











(Testimony of James Anthony Allen.)

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Etter:

Q. At the close of the testimony, Mr. Allen, if you recall, [1152] we had been asking you about a meeting at Mr. Keane's home. You recall that?

A. Yes, I do.

Q. Now at this time, Mr. Allen, I should like to hand you Defendant's for identification P, Q, R and S, and ask you to examine those and tell me what they are?

A. P is a waiver of notice of meeting and consent to hold a directors' meeting and transact business of the Pilot Silver Lead on the 21st day of February, 1947. It's signed by F. C. Keane, Irene Vermillion, and Glynn D. Evans. The next one, S, is the resignation of Glynn D. Evans from the Pilot Silver Lead Mining Company. R is the resignation of Irene Vermillion from the Pilot. Q is the resignation of F. C. Keane, on the 21st of February.

Q. I'll ask you, Mr. Allen, were you present at the time these instruments were executed?

A. I don't believe I was in there when they actually signed them, but we were in, as I recall, at 2:30 in the afternoon. They had prepared those in the morning. We asked to see the resignations and the minutes, Mr. Grismer and myself, and he

(Testimony of James Anthony Allen.)

handed us those resignations, together with——

Q. And are these the resignations to which you refer?      A. Those are the ones.

Q. And you saw them afterwards?

A. Yes, sir. [1153]

Q. And you recognize those signatures?

A. They are.

Q. And what were the circumstances surrounding that meeting?

A. Well, it was a culmination of attempting to have Mr. Keane make a disclosure of the affairs of those corporations.

Q. What events had preceded this meeting?

A. The trip down to his house sometime in the month of October; a conference with him at the time in the Davenport Hotel in connection with a note of the Independence, and several conferences in his office with Mr. Wayne, attorney at law, prior to that.

Q. Did you employ Mr. Wayne?

A. We did, yes.

Q. And what was done pursuant to your employment of Mr. Wayne prior to the execution of these instruments?

A. Several demands would be made on him by Mr. Wayne and ourselves, and he would always make an appointment and then fail to keep it, so we finally got to the point we said we'd call a stockholders' meeting and throw him out; he said we didn't have the stockholders' list, which was



(Testimony of James Anthony Allen.)

true, so we went to E. J. Gibson and got the list they had from the sale of treasury stock, also to Pennaluna and Company and got their list, and then confronted Mr. Keane with the list, and then he agreed to resign. [1154]

Q. What was said by him at the time of the resignations?

A. He asked if he could have about sixty days to get the bank balances in shape. We asked what was wrong with them. He said "Give me sixty days to get them in shape." Both Grismer and I agreed it would be all right, because we wanted to turn them over to Mr. Randall to have an audit anyway, but he did turn over the stock ledger, the seal of the company, and I think one or two files that might have had the articles of incorporation and so forth.

Q. Did you ever succeed in getting the bank ledger, checks, or otherwise, pursuant to this arrangement?

A. No, I never did. I made demands on him after that.

Q. And what was said by him?

A. He'd keep evading on that.

Q. And you never did get them?

A. I never did.

Mr. Etter: At this time I'd like to move that Defendant's P, Q, R and S be admitted in evidence.

Mr. Erickson: We have no objection to any of them.

(Testimony of James Anthony Allen.)

The Court: Let me see them. Exhibits P, Q, R and S admitted.

(Whereupon, Defendant's Exhibits P, Q, R and S for identification were admitted in evidence.)

Q. (By Mr. Etter): Do you know at this time in respect to attorney James A. Wayne of Wallace, Mr. Allen, do you know [1155] where he is?

A. Mr. Wayne is deceased.

Q. He is deceased?

A. He died sometime in August or September of 1947.

Q. Was any statement made by Mr. Keane at the meeting to which we've referred concerning any partnership agreement between you and he?

A. Never at any time either by Mr. Keane or Irene Vermillion.

Q. Was anybody else there?

A. Mr. McCann was there, Mr. Keane's law partner, who had been his partner since April of 1946.

Q. Did he make any such statement or claim?

A. Never made any such statement at all.

Q. I'll hand you Defendant's for identification N and O, and ask you if you recognize those, Mr. Allen?

A. Yes. O is the supplement agreement between the Lucky Friday Extension and the Big Friday. D is the original agreement between the Extension Company and the Big Friday.



(Testimony of James Anthony Allen.)

Q. Have you examined those before?

A. Yes, we have.

Q. And where did you secure those?

A. They were in the files when Mr. Grismer took the books and records of the Extension Company out of Mr. Keane's office.

The Clerk: I think you're mistaken on the original [1156] agreement; it should be defendant's N.

A. Oh, yes, N and O; N is the original, and O is the supplemental.

Mr. Etter: At this time I'd like to move that Defendant's N and O be admitted in evidence.

Mr. Erickson: We have no objection; I thought they had already been received in evidence.

The Court: Let me see them. Are copies already in evidence?

Mr. Etter: I don't believe so, your Honor. They were identified. Were they, Mr. Clerk?

The Clerk: I don't believe they are, your Honor.

The Court: Defendant's Exhibits N and O admitted.

(Whereupon, Defendant's Exhibits N and O for identification were admitted in evidence.)

(Whereupon, check and confirmation of sales of Clayton stock by Hogle and Co. to Keane were marked Defendant's Exhibit CC for identification.)

(Testimony of James Anthony Allen.)

Mr. Etter: Your Honor, at this time, if you will recall I was questioning Mr. Greene of J. A. Hogle and Company with reference to an account carried in Butte, Montana, by J. A. Hogle and Company. I have here now an exhibit marked Defendant's Exhibit CC for identification, and it is stipulated, I believe, between government counsel and defendant that the exhibit itself, being [1157] defendant's Exhibit CC, indicating a check to F. C. Keane, signed by J. A. Hogle and Company, and the billing on the same, may be admitted in evidence without further identification.

Mr. Erickson: That's correct.

The Court: Exhibit CC admitted, on stipulation of both sides.

(Whereupon, Defendant's Exhibit CC for identification was admitted in evidence.)

Q. (By Mr. Etter): Handing you Plaintiff's Exhibit No. 13, Mr. Allen, I'll ask you to examine that.

A. Well, that's a check to the Pilot Silver Lead Mines Company for \$40,000 from E. J. Gibson and Company.

Q. I'll ask you when you first saw that check, Mr. Allen?

A. I'm quite positive it was in Mr. Erickson's office would be the first time that I actually had a good look at that check.

The Court: What exhibit is that?

Q. Plaintiff's Exhibit No. 13. I'll ask you, Mr.

(Testimony of James Anthony Allen.)

Allen, whether you ever delivered this to Mr. Keane?      A. I did not.

Q. Handing you Plaintiff's identification 103, I'll ask you to examine that, Mr. Allen.

A. Well, this is a cashier's check payable to myself from the Old National Bank on October 15, 1945. It's endorsed by [1158] myself, and apparently was deposited in the Idaho First National Bank in Wallace, Idaho.

Q. Do you recall the circumstances surrounding this?

A. Yes. Mr. Keane asked me to pick up some money from Mr. Halin. Mr. Halin bought 200,000 shares of his stock. Mr. Halin gave me a \$13,000 check, as I recall, and I thought there was \$7,000 in cash, but it would have been \$5,000. I am not sure on that point, but at any rate I went to the Old National Bank and got this cashier's check for the cash money; it apparently was \$5,000 or I would have gotten it for the whole thing. I delivered the check to Mr. Keane in Wallace, Idaho, and I had a receipt for him to sign, that was in my brief case, and the brief case was in the office, so I didn't have it at the time.

Q. But you delivered it to Mr. Keane?

A. I delivered it to Mr. Keane, and I understand he deposited it to his account or to some account in the Idaho First National Bank.

The Court: That's what exhibit, 103?

Mr. Etter: It's not admitted yet, your Honor,



(Testimony of James Anthony Allen.)

but it's identified. At this time, your Honor, I'd like to move that Plaintiff's 103 be admitted in evidence.

Mr. Erickson: No objection.

The Court: Let me see it. Exhibit 103 admitted.

(Whereupon, Plaintiff's Exhibit No. 103 for identification was [1159] admitted in evidence.)

Q. (By Mr. Etter): Mr. Allen, you were here when Mrs. Vermillion was testifying?

A. I was.

Q. And you heard her say in substance and effect that you instructed her to issue certain stock certificates to you?

A. I've instructed Mrs. Vermillion to issue stock certificates to me from the Grismer stock after I had acquired it from Mr. Grismer.

Q. That is so?

A. That is so, on perhaps two or three occasions.

Q. Are those all the instructions for delivery of stock?

A. I've never given Mrs. Vermillion or anyone else an instruction to issue any of the treasury stock from the sale of this company.

Q. Did you ever either orally or in writing or otherwise authorize Mrs. Vermillion to sign your name on notes or checks?

A. Never at any time.

Q. Did you ever orally or in writing or other-

(Testimony of James Anthony Allen.)

wise authorize Mr. Keane to sign your name on notes or checks?

A. I certainly did not, never, at any time.

Q. Now you stated, I think, in your direct testimony that you owned 60 per cent of the stock in the Delaware Mines?

A. Yes; that may be a variance one way or another. [1160]

Q. Do you know offhand how much money of the Delaware Mines Corporation went into the Lexington or Montana Leasing in Montana?

A. Well, it would be difficult to state how much went in there, but there was approximately \$70,000 that should have.

Q. That went out of Delaware?

A. That's right.

Q. As indicated by the exhibits?

A. That's right.

The Court: And should have gone in where?

Q. Montana Leasing, or the Lexington Silver Lead. I should like to hand you plaintiff, government's Exhibit 116, being titled "Sales by James Allen of Lucky Friday transferred certificate 14" and so forth, and ask you if you have examined that, Mr. Allen, or a copy of it?

A. Yes, I have.

Q. I'll ask you whether or not that's a substantial representation of sales of Lucky Friday Extension stock made by you?

A. That is; it's substantially correct.

(Testimony of James Anthony Allen.)

Q. I hand you Plaintiff's Exhibit 117, entitled "Sales by J. A. Allen of Pilot Silver Lead stock transferred from certificates number 13 for 280,000 shares and 14 for 320,000 shares" and so forth, and ask you if you have examined a copy of that?

A. I have, and it's substantially correct. [1161]

Q. It's a substantial representation of your sales of stock? A. Yes.

The Court: This is Pilot?

Q. Yes, your Honor. Handing you plaintiff's 114, I'll ask you whether or not that is a substantial representation of the stock transfer indicated thereon?

A. No, this is not. The first column here would be correct. The second column has nothing to do whatever with the sale through Hogle and Company.

Q. Of that stock?

A. This represents the sale of 30,000 shares of Johnston's stock to J. A. Hogle and Company in Butte through my name, and a check for \$6,572.95 which is shown here.

Q. You examined that check?

A. I examined that check. That is not my signature on the check, and I never handled the check, and I never delivered any stock to Hogle and Company, have never had an account with Hogle and Company, and as indicated here, this is the only sale that went through Hogle and Company in my name.



(Testimony of James Anthony Allen.)

Q. What have you to say as to this first sale?

A. The 25,000, that was stock given to me by Mr. Keane in exchange for his right to purchase my option on the Delaware Mining stock of 500,000 shares from what is known as the Baumgartner stock.

Q. And pursuant to that, do you know whether Mr. Keane did [1162] purchase it?

A. He did.

Q. With respect to your sales, Mr. Allen, of the so-called vendor's stock in the Pilot Silver Lead Mines, when were the first sales of such stock that were made by you?

A. No sales were made by me of the Pilot stock until the latter part of July or in August of 1947.

Q. And that would be how many months after the original issue?

A. Somewhere in the neighborhood of 14 to 15 months.

Q. 14 to 15 months. With regard to the vendor's stock of the Lucky Friday Extension, when were any sales made by you?

A. The first sales would be over a year, sometime in July, about July 7, July 8.

Q. With respect to the sale of the stocks to which you've referred, Mr. Allen, were any of those stocks sold at the time or within a short time after the original issue to the public?

A. Of the vendor's stock you just spoke of?

Q. Yes.

(Testimony of James Anthony Allen.)

A. No. They were both instances over a year, or a year at least.

Q. Was any of the stock owned by you, I mean any of this vendor's stock of Lucky Friday Extension, sold by you at the time of the second issue of Lucky Friday Extension, when the market price was thirty two and a half cents a [1163] share?

A. No, not a share.

Q. And was any stock of Pilot at all sold by you, Mr. Allen, at the time of the original issue or shortly thereafter of Pilot stock, when it was ten or twelve and a half cents a share?

A. Not a share.

Q. And have you examined the exhibits to which I have directed your attention, and your own accounts, to determine what the average price of any stock sold by you in Lucky Friday Extension was, Mr. Allen?

A. On the exhibits just referred to, the average would appear there in 1947 at around ten cents.

Q. That's of Lucky Friday Extension?

A. That's of Lucky Friday Extension. My records show on through 1948 it would be closer to eight cents, for the average.

Q. What was the average price of all the stocks so far as the Pilot Silver Lead Mines, that was sold by you, Mr. Allen?

A. It would be three cents, just about.

Q. Was there any reason that you had for selling the vendor's stock that you had in both of these companies over a year after the original issue?

(Testimony of James Anthony Allen.)

A. Well, it was my understanding that if the stock was held for a year, that that would be in compliance with the [1164] S. E. C. regulations.

Q. And you therefore didn't sell any of that stock until that time?      A. I did not.

(Whereupon, report of expenditures and income for 1945 of Montana Leasing was marked Defendant's Exhibit DD for identification.)

Q. Handing you Defendant's Exhibit DD for identification, I'll ask you to examine that and tell us what it is.

A. Well, this is a recap of the monthly operations of the mine at Neihart, Montana, of the Lexington Silver Lead Mines, prepared by John P. Quinn and myself from the daily records posted in the various books at the mine, showing the yearly summary by month, and the distribution of the various departments or accounts to which the charges would be made.

Q. And when was that prepared by you and Mr. Quinn?

A. I would say that both of these were prepared about in January or February of 1947.

Q. That one of 1945?

A. This perhaps would be in 1946.

Q. And did you prepare such statements during each year that you were associated with the Lexington or Montana Leasing?      A. Yes.

Q. In your position, and supervising it? [1165]

A. Yes.



(Testimony of James Anthony Allen.)

Q. And these figures are yours and Mr. Quinn's, made at that time?

A. Well, they're Mr. Quinn's figures; they're not my figures.

Q. Now, are those the figures from which you secured the summaries you were using yesterday to refresh your recollection from?

A. Yes, they were transposed from records here. Now, I might say, I wouldn't swear that this was made soon after the year 1945, but a portion of it would be, so that it would be all brought up together in 1947, and that would be taken from the records that would be posted daily.

Q. Daily records?

A. Daily records at the mine.

Q. And was that part of your supervisory position, Mr. Allen?

A. It would be, yes.

(Whereupon, report of expenditures and income for 1946 of Montana Leasing was marked Defendant's Exhibit EE for identification.)

Q. At this time, Mr. Allen, I'll hand you Defendant's EE for identification, and ask you to examine it and tell me what it is?

A. This is also a recap of the operations for '46, made in '47, with Mr. Quinn's figures showing the monthly distribution of the expenses and the charge to the various [1166] departments.

Q. Both of these exhibits DD and EE are made during the course of the business of the Montana

(Testimony of James Anthony Allen.)

Leasing or the Lexington Silver Lead Mines?

A. They would be, and the figures reflected here would be posted daily in other ledgers.

Q. I see, and the book from which you were refreshing your recollection yesterday contains the figures on here, Mr. Allen?

A. It's transposed from there to this record, yes.

Q. By whom?

A. By myself and Mr. Smith, who was then in the office.

Mr. Erickson: I'd like to ask a question on voir dire.

**Voir Dire Examination**

By Mr. Erickson:

Q. On Identification DD, referring to the month of November, 1945, it shows there "Production, \$1905.19." Then I'll refer you to Plaintiff's Exhibit 118—or rather, I'll use Plaintiff's Exhibit 9-a, and referring to a deposit to the credit of Montana Leasing in the Idaho First National Bank, if you do not get \$2,253.95 for that month, and your report only shows \$1900.00?

A. There's apparently two checks from the smelter.

Q. One for \$1676.00, and one for \$557.50.

A. Well, oftentimes the records here would indicate a calculation [1167] of the concentrates during that month; that necessarily wouldn't reflect the cash income from the smelter.

(Testimony of James Anthony Allen.)

Q. Well, this was an actual bank deposit, was it not?

A. That's right. Now, there could be a carry-over, and I believe if you had the smelter checks they would show. The manner in payment of the smelter, when the bill of lading reaches the smelter, why, they advance 80 per cent on the estimate of the assays. It might take ten to fifteen days for the smelter to run their assays, so that at all times there might be a balance of a certain percentage of the last shipment due from the smelter, that might come in at the same time, or later, or earlier.

Q. Well, your figure here is incorrect, then, of \$1905.19?

A. No, I wouldn't say that it is incorrect, because the bank deposit would not truly reflect the concentrates as estimated at the mine by the engineer on hand for this month.

Q. Well, how do you explain your deposit shows you deposited \$2,253.95 in the Montana Leasing bank account in November, 1945, and your schedule only shows \$1905.00?

A. Well, we might have had a carry-over from September, and I might add, Mr. Erickson, that as far as the smelter checks or any deposits, or the administration of any of the bank accounts from the Idaho First National Bank, I wouldn't be in a position to state, because that was not within my province. [1168]

Q. Did you check those schedules yourself?

A. I have checked them, yes.



(Testimony of James Anthony Allen.)

Q. Did you go into all the checks, the receipts, and the payments, and disbursements, and deposit slips, to check them yourself?

A. No. You could not. These records are taken from the checks written at the mine, and the stubs of the checks there, which when the payroll checks would be cashed, they would go to the Idaho First National Bank, the bank statements would come to Mr. Keane's office. He was supposedly keeping ledgers up there for that purpose. The mine keeps this for the records from the various departments.

Q. So that those schedules are not complete?

A. They're complete as to mine records.

Q. They're complete as far as they go, but they do not intend or are not intended to be a full statement of the financial affairs of the Lexington Mining Company for 1945 and 1946?

A. That's right, they're not, and I qualified that yesterday. They are as far as the department of the mine is concerned.

Mr. Erickson: We have no objections to them being admitted for what the witness says they are.

The Court: Exhibits DD and EE are offered?

Mr. Etter: Yes, they are, your Honor.

The Court: Let me see them. Admitted; no objection. [1169]

(Whereupon Defendant's Exhibits DD and EE for identification were admitted in evidence.)

(Testimony of James Anthony Allen.)

Direct Examination—(Continued)

By Mr. Etter:

Mr. Allen, did you at any time aid, assist, or participate in the making of any annual reports of the Pilot Silver Mines Company?

A. Never at any time.

Q. That is in 1945 and 1946?

A. Yes, and the only reports in '47 and '48 would merely be tax reports, and no financial reports.

Q. I see; did you participate in any way or fashion or assist in the preparation of the annual report which is in the evidence in this case——

A. Never at any time.

Q. ——for the Pilot Silver Lead Mines?

A. No, never did.

Q. All right. Now, you were in court when Mrs. Herrick testified, Mr. Allen?

A. Mr. Herrick, you mean.

Q. Mr. Herrick, excuse me.

A. Yes, I was.

Q. What have you to say as to Mr. Herrick's testimony?

A. I'd say that his testimony is substantially correct.

Q. In what respects?

A. That I did talk with Mr. Herrick and Mrs. Phelan after— [1170] just before the time the purchase of the claims was consummated, but at no

(Testimony of James Anthony Allen.)

time did I direct Mr. Grismer to go see them about it.

Q. Now, you were here when Mrs. Phelan testified?      A. I was.

Q. What have you to say as to hers?

A. Mrs. Phelan is correct. Mr. Grismer asked me to go down to her house with him to explain the central development plan. The Phelan claims border just north of the Gold Hunter, and which I did, and I believe there was some discussion as to the price; I asked her what Mr. Grismer was paying her for them, and she said some figure, and I said if they're worth anything they're worth twice that amount.

Q. So her testimony was substantially correct?

A. Yes.

Q. Now, with respect to a civil injunction which is here in the evidence and filed by the government, obtained, as I understand it, Mr. Allen, in what year, if you recall?      A. 1943.

Q. And do you recall from examination of this exhibit, plaintiff's 121, a photostat, I'll have you examine that a minute, and ask you if you recall that?      A. Yes, I do.

Q. And what was the situation at that time with respect to [1171] any limitation on you in stock transactions?

A. Absolutely none at that time.

Q. Was there later?

A. I have been advised that later, six to seven

(Testimony of James Anthony Allen.)

months later that the Securities Act was amended or supplemented with an additional law that did have a prohibition in it with respect to a consent decree, which that was, that would prevent being connected with promotion directly for a period of three years.

Q. Now, did you talk with Elmer Johnston, the attorney, the mining attorney, who testified here early, about that particular injunction?

A. I did.

Q. And what purpose did you have at that time, Mr. Allen?      A. It was for the Gold Hunter.

Q. That's when you were——

A. ——negotiating for the Gold Hunter Mine.

Q. With the people that you discussed the other day?      A. That's right.

Q. And that was the time that you had the conversation?

A. That's right, and it resolved then it was just merely an inquiry, that even under that injunction, if the offering would have been, which it would, have exceeded \$300,000, there would have been no prohibition on me as far as a different section of the Act; that only applied to just [1172] one section of the Securities Act, as I understand it.

Q. I see. Now, regardless of the effect of that civil injunction, when would it have expired so far as any restriction contained therein?

A. Well, with respect to the Pilot——

Q. No; when would this have expired?



(Testimony of James Anthony Allen.)

A. It would have expired on June 4, 1946.

Q. 1946; and when was the—wasn't the original issue of Pilot on or about the 22nd day of May?

A. That's my understanding, on May 22.

Q. So that in twelve days from the original issue of Pilot——

The Court: What date did you say?

Q. The original issue of Pilot, May 22, 1946.

The Court: What was the date of the injunction?

Q. The 4th day of June of 1943. The issue of Pilot, then, occurred only twelve days before this injunction would have had no force or effect on any activities of yours other than provided by the statute? A. That's exactly right.

Q. Now, you've talked about the sale and transfer of stock of Mr. Grismer's. You were here when he testified, Mr. Allen? A. Yes, I was.

Q. And did you hear him state that he had such an arrangement with you? [1173]

A. Yes, he did.

Q. Now, pursuant to that, have you transferred over a period of years certain stocks to Mr. Grismer?

A. I have, over 700,000 shares in various companies.

Q. Tell us approximately what those companies were——

A. The Hunter Silver Lead——

Q. ——and the respective shares.

(Testimony of James Anthony Allen.)

A. —100,000 shares; the Alma, 100,000 shares; the Hibernia, 100,000 shares; Lexington Silver Lead, 100,000 shares; Coeur d'Alene, 100,000 shares; and Pilot Silver Lead, for which he had loaned me some stock earlier, and when I acquired Pilot in October, 1948, 250,000 shares of Pilot Silver Lead that I repaid him.

Q. Now, you have discussed this central development program at considerable length. Have those negotiations continued through the past several years?

A. They have; they've continued right along; they're continuing right at this present time.

Q. And who are you now negotiating with, Mr. Allen?

A. With the Day Mines of Wallace, Idaho.

Mr. Erickson: To which we object as incompetent, what he's doing at this time, more than a year after the indictment.

The Court: Well, I'll overrule the objection. It will be for the jury to determine whether the actions of [1174] the defendant after the indictment has been returned give any substantial assistance to the jury in determining what his actions were before he was indicted.

Q. (By Mr. Etter): All right, I'll ask you whether any negotiations were in progress, Mr. Allen, prior to the return of this indictment?

A. Yes, they were.

Q. And who were they with?

(Testimony of James Anthony Allen.)

A. With the Day Mines.

Q. What individuals? A. Mr. Rothrock.

Q. And who else? A. Mr. Lawrence Day.

Q. Will you state what the Day Mines are?

A. Well, that's one of the largest mining companies in the Coeur d'Alenes.

Q. I will ask you specifically, I might have made a mistake, Mr. Allen, did you have anything to do or participate in the preparation or otherwise of the statutory statement by Lucky Friday Extension Company with the State of Washington, being Defendant's Exhibit A?

A. I have never seen—never had anything to do with it, and never saw the statutory statement until sometime in 1947 or 1948 when Mr. Elmer Johnston showed me a copy of it that he had in his office.

Mr. Etter: That's all, your Honor.

The Court: All right.

#### Cross-Examination

By Mr. Erickson:

Q. Mr. Allen, what is your occupation at the present time? A. In the mining business.

Q. Are you an engineer?

A. No, I'm not.

Q. Are you an accountant?

A. No, I'm not.

Q. Now, you are a graduate of a law school, are you not?

A. I've had a course in law, I've never practiced law.

(Testimony of James Anthony Allen.)

Q. You are a graduate of a law school, are you not?

A. I am, of Cumberland University, yes, sir.

Q. You hold a degree in law?

A. That's right.

Q. You were associated with Mr. Towles in his office as a lawyer or in some capacity for a number of years, were you not?

A. Associate only to the respect of the mining companies, in mining only.

Q. You are quite familiar with the organization and the incorporation or promotion of mining companies?

A. No, indeed I wasn't. At the time I was in Mr. Towles' office was the beginning of the Callahan Company, the Callahan Consolidated, which I took active charge of the [1176] operations in connection with it, and also the Lexington Mining Company, that was in Mr. Towles' office, which was then the Montana Silver Queen Mining Company.

Q. How many years did you spend in Mr. Towles' office?      A. About four years.

Q. Mr. Towles practices mining law, does he not?      A. That's right.

Q. And during the four years you were in his office you were engaged in assisting Mr. Towles with mining cases and mining organization?

A. I have never assisted Mr. Towles with a mining corporation while I was in his office. His work



(Testimony of James Anthony Allen.)

was mostly to the patenting of mining claims.

Q. Now, when did you first become active in the Lexington Silver Lead Mines in Montana?

A. In 1938.

Q. And in what capacity was that?

A. Oh, I believe it was 1938, 1939, as the vice president in charge of operations.

Q. And how long did you continue at that time?

A. To the Lexington?

Q. Yes, in the Lexington.

A. Up to and including 1942 and the first half of '43.

Q. Did you leave the Lexington at that time?

A. Did I leave it? [1177]

Q. Yes.           A. No.

Q. Well, you say you were in charge up there until that time?           A. That's right.

Q. What happened then?

A. Then Mr. Keane took a lease on the Lexington plant for the purpose of running dumps on the Ripple, Lexington, and Benton group of claims, on June 26, 1943. I was not active in the Montana Leasing Company until sometime in 1944, and I remained on as a director, and still am, of the Lexington Mining Company, together with Judge McNaughton and D. A. Callahan, of Wallace, Idaho.

Q. Did you say that you and the defendant Keane were going to incorporate the Montana Leasing Company?

(Testimony of James Anthony Allen.)

A. Did you say that we were going to?

Q. Yes.

A. He did incorporate it. He said he was going to.

Q. But to your own knowledge you never knew whether he completed the corporation or not?

A. He most certainly did.

Q. Did he have a directors' meeting, and by-laws approved?

A. I saw the minutes to where he had, yes, but I was not a director of it.

Q. You were not an incorporator or director?

A. I was not. [1178]

Q. Who were the incorporators?

A. I believe Sherman Smith, an attorney at law of Helena, and two others of Helena were the incorporators, whom I don't know, then the incorporators elected Mr. Keane, Mr. Mullen and Mr. Smith as the directors.

Q. What was your capacity with the company, with the Lexington, at that time after the articles of incorporation were drafted by Keane?

A. Well, now, are you referring to the Lexington Mining, or the Montana Leasing?

Q. To the Montana Leasing, or whatever you call it.

A. Well, there's two distinct separate companies; there's the Lexington Mining Company and the Montana Leasing Company. I was a director and vice president of the Lexington Mining Com-

(Testimony of James Anthony Allen.)

pany. I had no official position and was not a director and was not active and had nothing to do with the management of the Montana Leasing Company in '43 or part of '44.

Q. As I understand, there was the old Lexington Company, which you were a director in?

A. That's right.

Q. And then there's the Montana Leasing Company, created by Keane——

A. That's right.

Q. ——which you say is a corporation and which he incorporated, [1179] and you had nothing to do with the Montana Leasing Company?

A. In the part of '43 or the early part of 1944, no.

Q. And how did you come to have something to do with the Montana Leasing Company then?

A. How did I what?

Q. How did you happen to become involved or interested in the Montana Leasing Company?

A. In 1944, when the contracts for the Benton and the Ripple were secured by Mr. Keane, the Lexington Silver Lead Corporation was to be formed, and was formed, at least he has told me that, for the purpose of taking over what interest the Montana Leasing Company held on the Lexington property, the contracts on the Benton group, the contracts on the Ripple group, and the investments of Independence and the Delaware into the Montana Leasing.

Q. And what capacity did you serve in the Mon-

(Testimony of James Anthony Allen.)

tana Leasing Company in 1944, when you entered the company?

A. I didn't serve as any director in it.

Q. Well, what were you, what was your position?

A. Well, it was the Lexington Silver Lead, it was carrying on as the Lexington Silver Lead, supposed to, at that time, and Mr. Keane was always to finish the articles of incorporation or to complete the corporation part of it.

Q. Well, were you employed by the corporation? [1180]

A. Was I employed by the corporation?

Q. By the Montana Leasing Company, the corporation that Keane set up; were you employed by that company?

A. No, but I had an interest, the Delaware Mines Company had an interest in the Montana Leasing Company, but I had no active part in the management.

Q. Who was the manager?

A. Keane and William Mullen, Sr. I believe Mullen Sr. was the active manager.

Q. And what was your position, then, in the property there, the Montana Leasing Company property; what was your position?

A. My interest in the Lexington.

Q. Yes, but what were you doing there on the property? You say you were not a manager; what were you? A. Doing on the property?



(Testimony of James Anthony Allen.)

Q. Yes.

A. Well, I don't know that I was at the Lexington property in 1943. I might have been, but to go to the property wouldn't necessarily—

Q. Well, what work did you do there after 1943 on the Montana Leasing property there?

A. I made periodic trips to Montana in connection with the development of the mining operations.

Q. Well, you were issuing a number of checks on the Montana [1181] Leasing Company. You were there in Montana at the time you were writing those checks, were you not?

A. I think that was in 1944, was it not?

Q. Well, I'm asking you if later, in 1944, you were there working? A. Yes.

Q. Were you in charge of operations at that time? A. Yes, I was.

Q. And who put you in charge of operations up there, or gave you that job?

A. Well, it would be the directors of the Lexington Silver Lead, which at that time were Keane and Mullen.

Q. When was the Lexington Silver Lead formed?

A. The articles of incorporation were to be drawn, and I believe were, in 1944, but according to the record, Keane did not file them of record until '45.

Q. So that we're not confused, there's the Montana Leasing Company, a corporation which was

(Testimony of James Anthony Allen.)

formed by Keane, is that correct, and then the Lexington Silver Lead Mines embodied the same property and the same corporation as the Montana Leasing, also formed by Keane?

A. It would be the same properties.

Q. But it was a different corporate set-up?

A. That's right.

Q. What was the difference in the corporate set-up between [1182] the new Lexington Silver Lead Mines and the Montana Leasing Company?

A. Well, in the first place it was an Idaho corporation as against the Montana Leasing being a Montana corporation; the capitalization was three and a half million shares as against I believe a million shares of Montana Leasing; I'm not sure as to what the capitalization of Montana Leasing was.

Q. Well, the Lexington was the successor to the Montana Leasing Company, was it not?

A. That's right, in 1944.

Q. Were you an officer or incorporator of the Lexington Silver Lead Mines?

A. I don't believe I was.

Q. Did you continue working there at the property at Neihart, Montana, for the Lexington Silver Lead Mines?      A. Yes.

Q. In the same capacity as you did for the Montana Leasing, as manager?

A. I didn't manage in the Montana Leasing until beginning in 1944.

Q. Well, after——

(Testimony of James Anthony Allen.)

A. We were all interested, as the Lexington Company, that the operation of the Montana Leasing would be profitable.

Q. But you were in charge of operations there, or superintendent, [1183] or whatever you call yourself, from 1944 to what date?

A. I still am, right to date.

Q. And during that time you were issuing the checks for the work, the labor, the materials, and the operations there, were you not?

A. No. Oh, occasionally, yes, and I've written several checks. The manager at the mine usually wrote the payroll checks most of the time.

Q. During that time you state that you didn't see any of the bank accounts or deposits, or were acquainted with how the Montana Leasing Company or the Lexington Silver Lead Mines were receiving their money, or the status of their bank account?

A. I didn't say that I didn't know the source of the money. I said that the Independence and the Delaware were putting in the money, together with some personal money, but I never had any occasion to question Mr. Keane's integrity or as to his manner of handling the bank accounts when they'd get into his office.

Q. You never did see any bank statements or bank accounts of this Montana Leasing Company or Lexington Silver Lead?

A. I wouldn't say I never saw any; I perhaps

(Testimony of James Anthony Allen.)

have, but as to any particular or specific one, I couldn't say definitely.

Q. Although you were making deposits to and writing checks [1184] in the amount of thousands of dollars——

A. That's right.

Q. ——you never did see any of the bank statements or cancelled checks?

A. I didn't say that. I say that I perhaps did, but I never had any question, any real suspicion at the time to question the manner in which Mr. Keane was handling the bank accounts.

Q. Well, you knew he was drinking at this time, didn't you?

A. Oh, not any more than he is right now, or any more than Mr. Horning is drinking, or Mr. Jones. If Mr. Keane was an incompetent during that time it was deceptive to Mr. Hull, the attorney for the Marquart-Kingsbury lawsuit that settled with him in June, 1946, Mr. Horning, Mr. Jones, and all of them, as well as it was to me.

The Court: I think this is a good time for a recess.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Erickson:

Q. Mr. Allen, you have seen Plaintiff's Exhibit



(Testimony of James Anthony Allen.)

120, which purports to be a list of Montana Leasing Company and Lexington Silver Mines, Inc., checks signed by J. A. Allen; you've seen that list? [1185]

A. I have, yes.

Q. Over a period beginning July, 1945, and ending in August, 1946, that's a period of 14 months, I believe; is that correct, you've seen that list?

A. I have. I just received it here about three or four days ago.

Q. Is that list substantially correct?

A. I would say it would be, yes.

Q. There are a number of checks in there for your personal living expenses, and to cash?

A. That's right.

Q. And there's some in there for gambling?

A. There's no gambling checks in there.

Q. Well, I'll refer you to one here for cash in the sum of \$2,890.30, dated March 31, 1946. Does that refresh your recollection?

A. Yes, it does, very well.

Q. What was that check for?

A. That check was for cash at the Rocky Mountain Cafe in Meaderville, Montana, where you'll find several other checks both prior to this and after this, where on trips to Neihart I would take cash, oftentimes give a check for it, oftentimes not even give a check until after I came back, for the purpose of cashing payrolls, not that I would cash them myself, but the store man at the store, [1186] which is sixty miles from a bank, on paydays there

(Testimony of James Anthony Allen.)

would perhaps be ten or fifteen thousand dollars worth of payroll checks; our superintendent used to loan the storeman cash for two or three days intervals, sometimes a week, until he would get his checks cashed in Great Falls at the bank and then return it.

Q. As a matter of fact, gambling is conducted in that restaurant?

A. Mostly a fine restaurant, and I think which is internationally known, and I have known the owner since I was a boy ten years old.

Q. Well, there's gambling conducted in the back room?

A. There is in practically every place in Montana.

Q. Now, on September 10, 1945, there are two \$100.00 checks for cash. Do those represent checks for gambling?      A. No.

Q. Then on October 3 and 4, there is, October 3, one \$100.00, cash, and then on October 4 there's four \$100.00 cash checks and two \$250.00 cash checks and one \$70.00 cash check. That money was for—was any of that for gambling?

A. I loaned that to a party in Wallace, and if you will look at the deposit, you will find that it was a thousand dollars. You will find a deposit of a thousand dollars the following day, by which he repaid.

Q. Why did you have to write it in so many different checks? [1187]

(Testimony of James Anthony Allen.)

A. That was his request.

Q. And it totals \$1070.00, I believe.

A. Perhaps the \$70.00 would be mine, Mr. Erickson, but not for gambling.

Q. And then on October 23 there's a check for \$200.00 in cash, and on October 28 a check for \$700.00 in cash.

A. In what year is that?

Q. That's in 1945. Is any of that for gambling?

A. No, it is not.

Q. Then on November 1, 1945, there's a \$1,000 cash and on November 3 there's one for \$100.00 and one for \$500.00 cash. Are any of those for gambling?

A. No, they would not be.

Q. In March, 1946, there's a \$100.00 check to the Stevens Hotel, March 13, followed by a \$33.92, \$100.00, \$118.04, \$100.00, and \$86.22. What are those for?

A. That would be for traveling and hotel expenses in Chicago.

Q. Those are Chicago, at the Stevens Hotel in Chicago?

A. The Stevens Hotel in Chicago.

Q. Then in May, 1946, there's a \$1,000 check to Elmer Johnston, that's the Elmer Johnston that testified?

A. That is right.

Q. And what was that for?

A. If my memory serves me correctly, Mr. Keane asked me to pay that to Mr. Johnston, and on several occasions I have [1188] paid out checks to Mr. Lakes at Mr. Keane's request, and that he would

(Testimony of James Anthony Allen.)

make the—I personally paid to Mr. Johnston, I think there's a \$200.00 check here payable to Mr. Johnston that I have charged to mining, that was a donation to the Catholic Lay Committee, for which he was head, and I solicited some money for him from my friends.

Q. These checks do contain your living expenses, grocery bills, and insurance premiums?

A. Some of them. The insurance premiums amount to about \$900.00 to a thousand dollars, which is charged to my personal account, should have been.

(Whereupon, a group of checks from Plaintiff's Exhibit 8-e for identification was marked Plaintiff's Exhibit 8-e-1 for identification.)

Q. Mr. Allen, I'll hand you Plaintiff's identification 8-e-1, the checks for cash totalling \$1070.00, on October 4, 1945, and ask you if that's your signature on those? A. That is.

Q. Those are the checks you referred to that were loaned to a friend?

A. That is right, for which the deposit for a thousand dollars was made the following day.

Q. These are endorsed "Brownie's Corner, by M. P. Savage, Manager" all of them, is that correct? [1189]

A. Let's see; I didn't look at them; that is right.

Q. No friend's name appears upon the endorsement? A. That's right.

Mr. Erickson: I offer them.

Mr. Etter: No objection.



(Testimony of James Anthony Allen.)

The Court: Let me see that. Admitted.

(Whereupon, Plaintiff's Exhibit No. 8-e-1 for identification was admitted in evidence.)

Q. (By Mr. Erickson): I hand you Plaintiff's identification 8-i-2, and ask you to state if those are not Montana Leasing Company checks signed by yourself, cashed at the Metals Bar in Wallace, Idaho?

A. Well, it has the North Idaho sales, which is Mr. McFee, Metals Bar, and his endorsement.

Q. Well, he runs the Metals Bar, doesn't he, Mr. McFee?

A. No, Mr. Bob McDonald runs it. I believe Mr. McFee——

Q. Owns the building?

A. ——owns the building; he owns the Samuels Hotel.

Q. One check for \$25.00, \$75.00, \$100.00, \$30.00, and one for \$50.00, is that correct?

A. I've cashed over a period of years many checks in the Metals Bar for cash.

Q. These were in a two-day period, is that correct?

A. Let's see, I didn't notice that.

Q. February 11 and 12, 1946, is that correct?

A. That's right.

Mr. Erickson: I offer it.

Mr. Etter: No objection.

Q. (By Mr. Erickson): Now, Mr. Allen, did

(Testimony of James Anthony Allen.)

the Delaware Mines advance anything to the Montana Leasing or Lexington Silver Lead account?

A. Did they?

Q. Did they?

A. All those deposits would have been made from Mr. Keane's office, I believe, from the smelter return checks that would come and would be deposited from his office.

The Court: Exhibit 8-i-2 admitted; you may proceed.

Q. Did you know or did you ascertain what amount the Delaware Mines was advancing to the Montana Leasing or the Lexington Silver Lead?

A. Well, they should have been advancing all of it.

Q. Well, will you answer my question? Did you make any effort to ascertain what amount the Delaware Mines was advancing or had advanced at any time?

A. At what period, at what time?

Q. Well, during any of this time before the indictment was returned did you investigate—

The Clerk: May I interrupt you a second? Your Honor, this last exhibit should have been 8-i-3.

The Court: What has been called 8-i-2 for identification, [1191] consisting of several checks drawn to cash, are admitted as exhibit 8-i-3. You may proceed. You may read the last question to the witness.

(Testimony of James Anthony Allen.)

(Whereupon, the reporter read the last previous question.)

A. Before the indictment was returned? Yes.

Q. When did you ascertain what amount the Delaware Mines Company had advanced to the Montana Leasing or Lexington Silver Lead?

A. The only way we had of determining that in the absence of never having had the records, the bank deposits of the Montana Leasing, would be taking it from the smelter checks that would have been paid in on the royalty, and in turn went to Keane's office to be deposited.

Q. Well, now, is it your contention that Keane kept the records of the Delaware Mines in his office, and they were not available to you for inspection?

A. That they were not?

Q. Yes.

A. They would have been available to me for inspection had I had any suspicion as to what he was doing.

Q. Although you owned 60 per cent of the stock in the Delaware Mines you were not interested enough to go to Keane's office and look at the state of the accounts, then?

A. Well, I trusted Mr. Keane implicitly, and Mr. Keane's [1192] investment of the Independence was so far exceeding that of the Delaware that I felt that he at all times——

Q. Well, did you ask Mr. Keane where the

(Testimony of James Anthony Allen.)

money was coming from that went into Montana Leasing?

A. Why, it was understood from the Independence.

Q. Did he show you a statement how much was coming from the Independence?

A. No. I have asked several times to get up an audit on all the companies so that it could be completed, but he would always ask to wait until he finished the Kingsbury-Marquart litigation.

Q. Well, didn't you get suspicious when he was stalling you off on giving you a financial report?

A. Not until sometime in 1946.

Q. So that your suspicions didn't arise, then, from 1944 to 1946, a period of two years in which you were being stalled, you never even got suspicious?

A. No, I did not.

Q. You received some of the Independence money yourself, that went into your personal account, didn't you?

A. For the Montana Leasing, and to Mr. Keane, you bet. That was the way Mr. Keane wanted it.

(Whereupon, Independence checks to Allen were marked Plaintiff's Exhibit No. 125 for identification.) [1193]

Q. I hand you Plaintiff's identification 125, which purports to be checks signed by F. C. Keane payable to J. A. Allen, on the Independence Lead Mining Company, and ask you if they do not total over \$32,000?



(Testimony of James Anthony Allen.)

A. If I may, in answer to this, Mr.——

Q. Well, just answer the question——

A. ——get my records on that.

Q. ——and then you can explain. Is L the one you want?

A. No, what I wanted was a green book of the Montana, a record like this, showing my disbursements.

Q. I don't know where it is.

The Court: Well, gentlemen, you may proceed. There was a question asked him. Would you read the question?

A. Yes, I admit receiving these, and will show that money going right to Mr. Keane and the Montana Leasing Company.

Q. Well, why did Mr. Keane issue the checks to you if the money went right back to the Montana Leasing Company? Why didn't Mr. Keane issue the checks to the Montana Leasing Company?

A. If you will look at those checks, Mr. Erickson, you will find some are issued, January 2, \$2500.00, of 1943, and you'll see checks subsequent to that up to June, which were loans to the Lexington Mining Company, for which the Independence Lead Mines had a mortgage to secure such [1194] loans. At times the Independence was advancing for payrolls of the Lexington, for which the money was available, but it would be repaid to the Independence, to Mr. Keane personally, and which was the way he asked the corporation to do it, and

(Testimony of James Anthony Allen.)

for which he asked the corporation, or Callahan Consolidated and the Lexington, to put the mortgages that were held by the Independence in his personal name. Here's total checks paid back to Mr. Keane at that time, \$29,408.88. I will produce the checks this afternoon if you so desire.

Q. So this, then, was the arrangement conducted by you at Keane's request, then?

A. The arrangement conducted by me?

Q. Well, yes, you agreed to this arrangement by Keane, the checks were made by Keane, Independence Lead Mining Company president, to you personally, and you agreed to that arrangement?

A. I don't quite understand your question.

Q. Well, you agreed to accept the checks and endorse them and deposit them in the Montana Leasing account?

A. Well, you'll find that the checks going on beyond that were—may I see them again, please? There was some reason in the beginning in connection with the retirement of the notes of the Lexington Mine on the Callahan mill that was paid to Sherm Smith. Mr. Keane brought it to me [1195] in cash, and some of those checks constitute that.

Q. Did you ever ask Keane why he didn't pay it to the Montana Leasing Company directly instead of running it through your name?

A. We relied on the arrangements he wanted, and we had no right, no authority, to question his authority for doing it, nor his intention of what it was.

(Testimony of James Anthony Allen.)

(Whereupon, check from Independence to Sherman W. Smith, 3/31/43, was marked Plaintiff's Exhibit No. 126 for identification.)

Q. I refer you to Plaintiff's identification 126, and ask you to state if it was not a check paid by Mr. Keane directly to Sherm Smith, by Keane?

A. That's right, plus about \$6,000 in cash, or \$4,000 in cash, as I recall.

Q. So that check does not comprise the entire loan, then?

A. I am not sure of that, Mr. Erickson. I know that the loan was much more than that.

Mr. Erickson: I offer 125 and 126.

Mr. Etter: I'm going to object to these exhibits on the ground that they're incompetent, irrelevant and immaterial, and because of the fact that objection was sustained on behalf of the government made yesterday to the examination of Mr. Denney concerning his examination at this time into Independence, and his answer that what [1196] he did was merely cursory, and indicating, as they do, a movement of the government through its cross-examination to go into those same things upon which they objected and were sustained yesterday. Otherwise I'd have no objection.

Mr. Erickson: I might state for the record these are the same checks referred to in Defendant's Exhibit L, which is already admitted in evidence by the defendant. There's a sheet in Defendant's L.

The Court: Is that right, Mr. Etter?

(Testimony of James Anthony Allen.)

Mr. Etter: If I see it. I'm not sure. There's a breakdown of checks attached here for '43, but I will state here and now, your Honor, that I expected, and I didn't examine this, that I expected that the only payments by check that we discussed yesterday in this exhibit were payments in 1945.

The Court: Let me see the exhibits. Will you point out the checks on this exhibit that you say are referred to?

Mr. Erickson: Yes, the checks beginning with January 6, 1943, payable to James A. Allen in the amount of \$2500.00; these checks are the checks which I have offered there.

The Court: Let me see it.

Mr. Erickson: That page and the page after that.

The Court: Objection overruled. The ruling the [1197] Court made as to Mr. Denney was correct. Mr. Denney's direct examination was such that the question asked of him was not proper on cross-examination. Mr. Denney is not on trial in this case. The ruling of the Court as to Exhibits 125 and 126 are based upon the record as it is now, and on the basis of the direct examination of Mr. Allen and exhibits introduced by him. The objections are overruled. Exhibits 125 and 126 admitted.

(Whereupon, Plaintiff's Exhibits No. 125 and 126 for identification were admitted in evidence.)



(Testimony of James Anthony Allen.)

Mr. Etter: Exception, your Honor, and may I request at this time, your Honor, that prior to the noon recess I may make a statement for the record in regard to that exhibit, on behalf of the defendant Allen?

The Court: Which one?

Mr. Etter: The exhibit which appears attached to that audit, the first two sheets which appear attached to that audit.

The Court: You may proceed.

Q. (By Mr. Erickson): Well, Mr. Allen, you were not acquainted with the sources of money, then, that the Lexington Silver Lead Mines or the Montana Leasing Company had?

A. I was acquainted with the sources as to my own, Mr. Keane's personal money, the Delaware and the Independence.

Q. But you kept no track or knew not how much each contributed, [1198] if anything?

A. Oh, I knew they contributed something. As to what amount, no.

Q. Were you acquainted with the financial condition of the Montana Leasing Company in 1945, or the Lexington Silver Lead Mines, as to whether or not they had money enough to operate at that time?

A. I believe you would find, as we see it now, that at no time in connection with the operations was it the practice of keeping a surplus of funds in the Montana Leasing or the Lexington Silver Lead in

(Testimony of James Anthony Allen.)

itself, but to draw from the treasury of the Independence or the Delaware or personal, as it was needed.

Q. Did you have discussions with Keane about payroll accounts that had to be met in the Lexington?

A. Did I have discussions, that had to be met?

Q. Yes.

A. Well, he was as familiar with them as I was.

Q. Well, who made out the payroll checks?

A. Over at the mine, the superintendent.

Q. Under your direction?

A. Well, I wouldn't—no, not on every payroll check.

Q. Whose job was it to see that there was money enough in the bank to cover the payroll checks?

A. Mr. Keane assumed that authority, because of the heavy [1199] investment of the Independence.

Q. Isn't it a fact that in 1945 that the Montana Leasing Company or the Lexington Silver Lead Mines was short of money and in very desperate need of a new source of funds, the Independence funds had been exhausted?

A. Not to my knowledge, Mr. Erickson. The Independence funds according to that audit were not exhausted, the Montana Leasing Company was not pressed for any money, and if it had been, it could have been shut down on ten minutes' notice, if that was the case.

(Testimony of James Anthony Allen.)

Q. What time was this audit made that you speak of?

A. We find now it was 1947, but it still reflects the cash transactions to Mr. Keane in the months of June and July of 1945.

Q. Well, you wouldn't know the condition of the Montana Leasing Company in 1945 from an audit made in 1947, would you?

A. No, I would know it from Mr. Keane.

Q. What did Mr. Keane tell you about that?

A. Well, that at all times that in my opinion the Independence had sufficient money to carry through.

Q. Didn't he state to you that the money had run out from Independence about 1945, and that some other source of money would have to be secured?

A. He never did; it was never mentioned. [1200]

Q. I hand you Plaintiff's identification 8-k, which is a statement of the Lexington Silver Mines Company for the month of April, 1946, and hand you the cancelled checks in there, and refer you particularly to the check for cash dated March 31, 1946, for \$2,890.30, and ask you which payroll checks that was made to cover?

A. This was not made to cover any payroll check contained in this statement. This was cash to be brought up that would be loaned, if it were necessary, for the storekeeper to have money to cash these checks, and which ones I wouldn't know.

(Testimony of James Anthony Allen.)

I did take this check and redeposit it in my personal account, and will show you on November 28, 1946, from an accumulation of such checks as that and others, where I deposited \$8,000.00 on November 28 of 1946.

Q. Are there any payroll checks in the bank account, bank checks for April, 1946, that this check of March 31, 1946, was made to cover, any payroll checks?

A. That's misleading, Mr. Erickson. I didn't state at any time that I made checks to cover payrolls. I stated that the bank at Neihart—or the grocery at Neihart, which is a small town, and isolated from a bank by sixty miles in either direction, that it would require sometimes to have considerable cash on hand to meet the payroll checks that would come from all the mines.

Q. So you took this check, then, from the Rocky Mountain—— [1201]

A. I didn't take the check from the Rocky Mountain; I took the cash.

Q. Took the cash and gave that to the merchant at Neihart?

A. He didn't need it at that time, but I had it available if he did.

Q. You just kept it in your pocket?

A. That's right, and the check was made after I came back from Neihart, after I had received the cash for over a week.

Q. Where was the Rocky Mountain Cafe?



(Testimony of James Anthony Allen.)

A. Meaderville, Montana, on the road to Neihart.

Q. And that's right close to Butte?

A. It's right out of Butte.

Q. You say that you were acquainted with the fact that an injunction had been secured against you prohibiting you from promoting any mining company?

A. At the time the injunction was entered——

Q. Were you familiar with it? You can answer that, Mr. Allen.

A. Not familiar with it to the extent it prohibited me from entering any mining organization, no, at the time the consent decree was entered into.

Q. And you checked that with Mr. Newton, through your attorney, Mr. Johnston?

A. That would be two years later.

Q. Well, yes, in 1945 you did check with Mr. Johnston? [1202]

A. That is right.

Q. And Mr. Johnston in your presence called Mr. Newton, an attorney for the Securities and Exchange Commission, who refused to give you permission to operate, and told you the injunction would have to run its course?

A. He did not tell me that.

Q. What did he tell you?

A. I didn't talk to Mr. Newton, but Mr. Johnston did, and as I understood from Mr. Johnston, that it would be possible, but that would have to come from Washington, D. C., but it still wouldn't

(Testimony of James Anthony Allen.)

prevent the organization for a full registration.

Mr. Erickson: Well, now, I move that answer be stricken as not responsive.

Mr. Etter: It's responsive to the question. "Operate" was the word used in the question.

The Court: Just a moment; let's hear the question.

(Whereupon, the reporter read the last previous question.)

The Court: What did Mr. Johnston tell this witness; now, you're not to give any inferences that you drew, but are merely to reproduce to the best of your ability what Mr. Johnston said to you about his call to Mr. Newton.

A. Shall I answer that now? [1203]

The Court: Yes.

A. He stated that Mr. Newton stated that would have to come from Philadelphia, that the Regional Office was not too familiar whether it could be accelerated or whether it couldn't be, that injunctions applied to just the new regulation which was put into effect, which was after the consent decree of the Lexington Company was entered into in 1943, and did not prevent me——

The Court: Just a moment; is this what Mr. Johnston said that Mr. Newton said?

A. Well, I don't know; Mr. Johnston told me this; whether Mr. Newton said it I don't know, but it did not keep me from being connected with an

(Testimony of James Anthony Allen.)

organization or promotion of any company if a full registration was made, or I think under the \$100,000 exemption, but it did with respect to the \$300,000.

Q. To your knowledge was a full registration made of Pilot or Extension, or not?

A. I don't know as to that.

Q. You didn't pay any attention to that?

A. Not too much, as to what they were registering under; I think it's the regulation A, as I've understood, which is not a full registration.

Q. Well, you stated in your direct examination that you knew nothing about the organization of the Lucky Friday Extension [1204] other than you heard Sekulic discussing.

A. My knowledge of what it was registered under, it would be common knowledge to anyone, not only to me.

Q. You were acquainted with the Big Friday property and Mr. Horning and Mr. Sekulic, were you not?

A. Yes, I was.

Q. And they were acquaintances of yours and had been for some time?

A. Yes, they had.

Q. And when the question was put up by Mr. Sekulic about advancing—was it \$500.00 or \$1,000 each—

A. I forget which it was; it was something in that neighborhood, five hundred or a thousand.

Q. —were you willing to put up \$500.00 yourself?

A. No.

Q. Did you decline?

(Testimony of James Anthony Allen.)

A. I just was not interested in it. I don't know that I specifically declined. John constantly had some proposition at all times where to put money into.

The Court: It is 12 o'clock. The trial of this cause is recessed until 1:30. The jury will remember the admonition of the court.

(Noon Recess.)

(All parties present as before, and the trial was resumed.) [1205]

### Cross-Examination

(Continued)

By Mr. Erickson:

Q. Mr. Allen, I'll hand you Plaintiff's Exhibit 47, those are stock certificates to Beatrice McLean in the Lucky Friday Extension Mining Company. Do you recognize those?

A. I recognize that they're Extension Mining Company certificates in the name of B. A. McLean, but as to how and when I received these particular ones I wouldn't be able to state specifically.

Q. Were they later sold for your account?

A. That I couldn't tell until I would look on the schedule, Mr. Erickson.

Q. I'll hand you Plaintiff's identification 49 and 49-a, and ask you if they will refresh your memory in connection with Exhibit 47?

The Court: Are they both identifications?

Mr. Erickson: Yes, they are identifications. 47 is an exhibit.

(Testimony of James Anthony Allen.)

A. Yes. This is dated December 17, 1946. It does, if these are the same ones, that's right.

Q. So this letter would indicate——

A. ——that I received the certificates.

The Court: Which letter is that?

Q. That is plaintiff's 49, and 49-a is the return card, registered return card, and that's signed "James A. Allen, by Arthur Lakes, Jr."? [1206]

A. That is right.

Q. And Arthur Lakes, Jr. was an employee of yours at that time?

A. For about two months, in the office.

Mr. Erickson: I will offer 49 and 49-a.

Mr. Etter: No objection.

The Court: Exhibits 49 and 49-a admitted.

(Whereupon, Plaintiff's Exhibits No. 49 and 49-a for identification were admitted in evidence.)

(Whereupon, check 3/31/46 for \$2890.30 on Lexington Company by Allen was marked Plaintiff's Exhibit No. 127 for identification.)

Q. I'll hand you Plaintiff's identification 127, and ask you if that's the check to cash in the sum of \$2,890.30, dated March 31, 1946, which I referred to this morning? A. That is right.

Mr. Erickson: I will not offer it at this time; it's for the purpose of rebuttal. Well, I will offer it at this time; I think it's properly identified. It was seen by counsel this morning.



(Testimony of James Anthony Allen.)

Mr. Etter: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 127 for identification was admitted in evidence.)

Q. Now, Mr. Allen, you state that you deposited out of your personal account certain monies in the Montana Leasing [1207] Company account in 1945, and yesterday there was admitted Defendant's Exhibit X, the first check in that series being a check dated April 11, 1945, to the Montana Leasing Company for \$1,000.00, and signed "J. A. Allen, Trustee." What was the source of that thousand dollars you put in the Montana Leasing account?

The Court: What check is this?

Mr. Erickson: Check No. 1 in Exhibit X.

A. Let's see if I could give you that. I would have to have the work sheets from the office to show that. I believe it was from the sale of some of my securities in other companies; it could be.

Q. The sale of securities in what company?

A. It might be; it would be difficult for me to say right now.

Q. And the second check is a check for \$1500.00 dated May 24, 1945, and the third check is a check dated May 28, 1945, for \$1,000 payable to F. C. Keane, and I don't know how it's endorsed on the back. Do you know where that third check went for a thousand dollars, payable to F. C. Keane?

A. It was deposited with the Idaho First National Bank.

(Testimony of James Anthony Allen.)

Q. For the Montana Leasing account?

A. It doesn't state to whom, it just has the bank endorsement.

Q. What was the source of the funds comprising Defendant's Exhibit X there for 1945, monies that you paid to the Montana Leasing Company? [1208]

A. It was—we've gotten up a statement and attempted to trace all of these, which you and Mr. Denney are both familiar with. Sometime in January we came to your office in order to secure the Montana Leasing Company checks, in order that I might be able to do this very thing, to trace certain monies that came into my account and then out again, and I submit I'm not in a position at this time to state exactly what it is, specifically.

Q. You say you think it's from the sale of securities? A. Perhaps it would be.

Q. You don't know what securities they are, or who the securities came from?

A. They would be my personal securities, if it were from that source. I have had during that time checks from Mr. Keane, and in turn paid them back to him, and that may be the source of some of that, but I wouldn't say.

Q. Monies that you received from Mr. Keane?

A. It could be, but I couldn't say until I would check the work sheets, if it would show on that, or my bank deposits showing the source of it; that's what we attempted to do for over the six year period.

(Testimony of James Anthony Allen.)

Q. Then I'll hand you Defendant's Exhibit Y, checks which total \$70,000 representing cash payments made by you in 1946 to the Montana Leasing Company. Can you state the source of those funds?

A. I believe I can pretty accurately, and I believe Mr. Denney, who has made the investigation in the brokerage houses, pretty well determine the source of all this money.

Q. These monies are monies received from the sale of stocks?

A. I wouldn't say that, no. They would be sales of stocks I had in corporations, not the Extension or Pilot; some of it would be sales of Extension stock; others would be for loans and mortgages I had.

Q. But you would say a substantial portion of this was from the sale of Pilot and Extension stock in 1946?

A. I would say not one penny of it was from the sale of Pilot stock in 1946.

Q. Would you say from Extension stock?

A. I would say some Extension stock, which was a year after the Extension stock had been offered.

Q. Exhibit Z, your checks to the Lexington Silver Lead Mines, successor to Montana Leasing, totalling \$76,000, what would you say was the source of those funds for 1947?

A. A small portion of those funds would be from Extension and Pilot stock, but the majority of it would be from stocks in other corporations that I owned, in addition to mortgages and loans.

(Testimony of James Anthony Allen.)

Q. How much of this would be from the sale of Extension stock, if you know? [1210]

A. In 1947?

Q. Yes.

A. I would say it as an estimate, rather than get it exactly, about \$15,000 of the \$70,000 would constitute sales of Extension stock, and about \$9,000 would constitute sales of Pilot in 1947.

Q. What other stocks did you sell to get that money?

A. Merger, Hunter Creek, Rainbow, Callahan Consolidated, Silver Syndicate, mortgages on my house and mortgages on my car, and personal loans without any security, to where I now owe \$50,000.

Q. In 1946, how much of that came from Extension in 1946?

A. My records up to 1948 show in 1945 I received \$5,337.50 for Extension stock, at a price of  $21\frac{1}{4}$ —

The Court: In 1945?

A. November, 1945.

The Court: How much did you receive?

A. \$5,337.50; the average price of the stock was 21.35 cents. In 1946 it was \$45,347.54, or a price of 15.637 cents per share. 1947 was \$17,039.22, at a price of  $41\frac{1}{2}$  cents a share. In 1948 it was \$4,687.50, or a price of  $41\frac{1}{2}$  cents a share.

The Court: I didn't get that last figure.

A. \$4,687.50, at a price of  $41\frac{1}{2}$  cents a share. These are as close as the records we have been able

(Testimony of James Anthony Allen.)

to get in a hurry [1211] and take an accounting, under the conditions and from the records that we had.

Q. What time did you become president of the Pilot Mining Company?

A. October 8, 1948—1947.

Q. Wasn't it February that you became president, February, 1947?

A. No. Mr. Keane drew the minutes that way. I resigned so that the minutes would be corrected, right in Mr. Keane's presence, and Miss McLean or Mr. Mullen was put on the board of the Pilot that very day. I was elected that by the directors of the company on August 7, and Mr. James Wayne, the attorney at Wallace, drew the minutes.

Q. Was that '47?           A. 1947.

(Whereupon, summary of sales account of B. W. Porter of Extension stock was marked Plaintiff's Exhibit No. 128 for identification.)

Q. I'll hand you Plaintiff's identification 128, and ask you to state if that is an accurate statement of your transaction with B. W. Porter, the witness who testified yesterday, with regard to the sale of Lucky Friday Extension stock transferred from certificate 14 in the name of J. V. Grismer for 1,229,700 shares?

A. I believe it would be substantially correct.

Q. What was the purpose of running your stock through Mr. Porter's account?



(Testimony of James Anthony Allen.)

A. I believe that Mr. Porter had some Hunter Creek stock that he had purchased from the Standard Securities at a high price, and there was no reason for running it through Mr. Porter's account in Wallace other than that he happened to be in Wallace before I was, and I asked him to arrange at Pennaluna Company for the sale of the stock, because we needed \$5,000 at that time to meet a payroll.

Mr. Erickson: I'll offer 128.

Mr. Etter: No objection.

The Court: Exhibit 128 is admitted; there's no objection.

(Whereupon, Plaintiff's Exhibit No. 128 for identification was admitted in evidence.)

Q. When did you first become interested in the Lucky Friday Extension as a stockholder?

A. I would say in August, or I mean October, 1945.

Q. And how did you happen to get a stockholders' interest in the Lucky Friday Extension at that time?

A. From Joe Grismer.

Q. And what was the reason that you sought to acquire a stockholder's interest in the Lucky Friday Extension at that time?

A. Because the market on all the stocks was very good at the [1213] time.

Q. And that's the time that you made a partnership agreement with Grismer whereby—

(Testimony of James Anthony Allen.)

A. I made no partnership agreement with Grismer at all.

Q. Well, you made some agreement with Grismer about the exchange of certain stocks?

A. That's right.

Q. It was an agreement to trade and exchange certain stocks, by which you got 300,000 Lucky Friday Extension?      A. That is right.

Q. And you signed a written agreement with Mr. Grismer at that time?

A. Not at that time, no.

Q. Well, at a subsequent time?

A. At a subsequent time we did, yes.

Q. When was that agreement signed, after the indictment?

A. I don't know that it was after, and as a matter of fact it was reduced to writing at Mr. Grismer's suggestion. I had advanced him sometime in 1945——

Q. Well, I think you've answered the question. I just asked you when it was signed.

A. Well, I was just going to say that there was no apparent reason as far as I was concerned to reduce it to writing.

Q. But was it in 1948?      A. I believe it was.

Q. You don't know what time it was?

A. I couldn't say, definitely.

Q. And the original agreement was made three years before, in 1945, then?      A. That's right.

Q. And it was fully executed in 1945?

(Testimony of James Anthony Allen.)

A. Well, it was a continuing agreement; after we had to take the records and the companies away from Mr. Keane in order to hold the companies together it was just a question of using the stock for the purpose of getting sufficient money to keep the companies together.

Q. Now, you've heard the testimony here with regard to the organization of the Pilot Silver Lead Mines, and you've heard a conversation related with Mrs. Emeline Phelan, and you stated that that was substantially correct. What part of it is incorrect, in Mrs. Phelan's testimony?

A. Well, I couldn't remember offhand Mrs. Phelan's testimony, other than that I did go down to her home with Grismer and Grismer asked me to go down there to explain to her the central development, which I did.

Q. And you explained not only the central development, but you explained the organization of the Pilot Silver Lead Mines to Mrs. Phelan, didn't you?

A. I don't believe I did, and if Mrs. Phelan testified to that, I wasn't agreeing that that part would be substantially [1215] correct.

Q. Well, Mrs. Phelan went down to the Callahan Consolidated office to see you the next day?

A. Not to see me; to see Mr. Grismer, and I was there.

Q. But you talked to her?

A. I talked to her, yes.

(Testimony of James Anthony Allen.)

Q. And you explained the deal to her, and raised Mr. Grismer's offer, didn't you?

A. I explained Mr. Grismer's offer at that time?

Q. Yes, and raised the amount of money.

A. No, I think that was done at her home. I didn't tell her—I said if it was worth anything it should be worth twice as much, and Mr. Grismer carried on the agreement from there on.

Q. So your testimony is you did not make an agreement with Mrs. Phelan; Mr. Grismer made the agreement in your presence as you suggested, the amount as you suggested?

A. Repeat that, Mr. Erickson.

Q. Well, did Mr. Grismer make the agreement with Mrs. Phelan, or did you make the agreement?

A. Mr. Grismer made the agreement.

Q. But did Mr. Grismer accept the amount of cash for the claims as you suggested?

A. He didn't accept it; he paid that, or had it paid by Mr. Keane to Mrs. Phelan. [1216]

Q. So Mr. Grismer accepted the amount that you set for the claims?

A. I didn't set it; I didn't know at the time what his offer was.

Q. How did you raise it, then, and say they should be worth twice as much?

A. Just because they would be, for \$300.00, any claim ought to be worth that much.

Q. The check was paid in Mr. Keane's office?

A. That I couldn't say.

(Testimony of James Anthony Allen.)

Q. Well, you didn't pay the check?

A. I didn't pay the check.

Q. And the agreement for the amount of stock that Mrs. Phelan was to receive, was that made by you, or by Mr. Grismer?      A. By Mr. Grismer.

Q. Was Mr. Grismer sufficiently acquainted with mining stocks and mining finances to make a definite agreement for shares of stock?

A. I think Mr. Grismer is far more acquainted with mining and mining stocks than I ever will be. He's carried the Merger Mining case, charging mismanagement of it, for ten years in the courts.

Q. That's not responsive. Mr. Allen, you remember the testimony of Mr. Herrick, when you approached Mr. Herrick about the Cincinnati claims that later comprised the Pilot group? [1217]

A. I remember that, but I did not approach Mr. Herrick, and I don't believe Mr. Herrick testified that I did approach him.

Q. Well, did you have a conversation with Mr. Herrick?

A. Practically on the same basis as Mrs. Phelan.

Q. Did you make the agreement with Mr. Herrick?

A. I did not make the agreement; Mr. Grismer made the agreement.

Q. In your presence?

A. No, the negotiations were started with Mr. Herrick before I ever came into it.

Q. You heard Mr. Grismer testify that you knew



(Testimony of James Anthony Allen.)

more about the deal than he did, and that you did make the agreement; is that testimony incorrect?

A. That testimony of Mr. Grismer is an absolute falsehood if he said that, because he's known the claims, he's known the country, he's known Mrs. Phelan, and he's known Mr. Herrick for twenty years before I ever knew them.

Q. You heard the testimony of Mr. Horning, who testified earlier in this lawsuit, the attorney in Wallace, Idaho, who stated that he called you about the contract between the Lucky Friday Extension and the Big Friday, and you told Horning that the contract was a masterpiece; do you remember that conversation?

A. I do. I don't believe I told him that over the telephone; [1218] I don't believe I called him. I did ask Horning for a copy, after the original was signed, and if I made any reference to a masterpiece, like Mr. Keane called Horning the master, also, it was a masterpiece for the Big Friday Mine, but I don't recall saying it was a masterpiece.

Q. Well, did you get that copy of the contract from Horning, at what time?

A. I don't believe I ever got the copy from Horning.

Q. What time did you have some conversations with Horning about the Big Friday contract?

A. Sometime in July or August, when negotiations were started for the Hunter Creek.

Q. That was before you acquired any stock from Grismer?

(Testimony of James Anthony Allen.)

A. Before I acquired stock from Grismer, and before any arrangements for the stock from Grismer.

Q. Now, you were quite friendly with the defendant Grismer at all times up until a short time ago, were you not?

A. I was extremely friendly with Grismer, and until he testified here the other day I always considered to still be friendly with him. It seems as though when you dismissed the other six counts with Grismer it made some difference in his attitude toward me.

Q. You were friendly with Grismer——

A. And still am.

Q. ——up until Mr. Grismer entered a plea of nolo contendere in [1219] this court?

A. I was friendly with him after that. Mr. Grismer signed an affidavit in this civil suit we have against Keane after he entered the nolo contendere, which was read into the meeting here, or into the records.

Q. Well, Mr. Allen, when did you first realize that some money had been stolen from the Lucky Friday Extension and the Pilot Silver Lead Company?

A. I don't know that I would say that we realized that it had been stolen or embezzled. I think the real suspicion of that started about in June or July, when Mr. Keane was settling the Independence lawsuit.

(Testimony of James Anthony Allen.)

Q. June or July, what year?

A. Of 1946, with Mr. Horning and Mr. Hull and his law partner Mr. McCann. There was about \$40,000 drawn out of the Pilot, as the audit now shows, during the month of June and July——

Q. Well, you've answered the question; I asked you when you became suspicious.

A. I would say that it would be about at that time.

Q. You knew that considerable money had been stolen or embezzled from the Lucky Friday Extension and the Pilot Silver Lead Mines by August 4, 1947, didn't you?      A. By August 4, 1947?

Q. Yes. [1220]

A. Well, Mr. Keane brought a suit in June of 1947 in Wallace, Idaho——

Q. Well, did you know it, or didn't you know it?

A. He made a public announcement in the paper that he had borrowed all the money.

Q. Did you feel on August 4, 1947, that you were responsible for the stealing or the embezzlement of any monies?

A. I resent your implication, and I did not.

Q. All right.

A. I have stolen nothing in my life, nor have I embezzled anything.

(Whereupon, trust agreement was marked Plaintiff's Exhibit No. 129 for identification.)

(Testimony of James Anthony Allen.)

Q. I hand you Plaintiff's identification 129, and ask you if that is not a trust agreement which you entered into on August 3, 1947, agreeing to pay back certain monies?

A. That is right, and I refer you here to paragraph 1 of the agreement—

Q. No, I just asked you what it was.

A. It is a trust agreement, but where is the agreement with the trust? There's another agreement that accompanies this, Mr. Erickson, that should be in connection with that, in order to explain that.

Q. Is this a copy of the agreement that was signed?      A. I wouldn't say. [1221]

Q. Well, look at it and see whether it was or wasn't.

A. Yes, I would say that it is exact. It was approved by the directors of both the companies at that time, and signed.

Mr. Erickson: I'll offer the agreement in evidence.

*Voir Dire Examination*

By Mr. Etter:

Q. Mr. Allen, is this the entire agreement?

A. No, that is not. That's a part of it. The agreement that supports that, that had to be signed before that, was where I denied each and every allegation in Keane's complaint, and he signed that.

Q. And that's left off?

A. And this is a negotiated settlement with the

(Testimony of James Anthony Allen.)

companies that he claimed it was his own personal interest in.

Mr. Etter: I'll object on that ground, that it's not the entire agreement.

Cross-Examination

(Continued)

By Mr. Erickson:

Q. This part of the agreement here is completed down to the signature and the acknowledgment part, is it not, signed by you and Mr. Keane, your signature and Keane's signature appear thereon in typewriting?

A. That's right, but there are two agreements that have to be together.

Q. This is a complete agreement in itself, but some other agreement should be attached hereto?

A. The agreement that supports that trust is what is missing, that explains the reason for that trust.

Q. But this is the complete trust agreement without the explanation? A. That is right.

Mr. Erickson: I offer 129.

The Court: Well, let me see it. As I understand it, the objection, and only objection, is that the witness has testified that there was another agreement that ought to accompany this one.

Mr. Etter: I'd like to ask a couple of questions on voir dire first.

The Court: All right.



(Testimony of James Anthony Allen.)

Voir Dire Examination

By Mr. Etter:

Q. You state there was another agreement that ought to accompany that agreement, Mr. Allen?

A. That's right.

Q. And what were the circumstances surrounding the execution of the two agreements, including the one that is not here, and the one that's been offered?

A. In March or April a receivership was filed by parties in Spokane against the Independence and Mr. Keane. I brought an action against Mr. Keane and the Independence in Federal Court in Coeur d'Alene, the Pilot and Extension through Mr. Wayne brought an action against the Independence [1223] and Mr. Keane for an accounting of monies that had been diverted from these companies into his personal account and into settling lawsuits. We brought an action as the Lexington Silver Lead against Mr. Keane for an accounting. These was just merely an answer made, then Mr. Keane two months later through his attorneys, he testified here however he didn't know anything about what the complaint was, brought an action against me and nineteen companies for a receivership, June 25, 1947. Mr. Horning intervened to negotiate a settlement of this receivership; negotiations were carried on for practically three weeks of Mr. Keane's claim of an interest in these various corporations that he had borrowed this money from, the Independence,

(Testimony of James Anthony Allen.)

borrowed it from the others. The negotiations were carried out, and certain stocks were put up from the companies into the trust in payment of these funds.

Q. I'm speaking about the agreement that isn't here. What did that agreement have to do with this agreement?

A. That the allegations in his complaint as against me as being a partner and this and that, and the borrowing of these funds, was specifically denied by me to each and every allegation in there.

Q. And that was signed?

A. Yes, and in order to compromise and protect these [1224] companies the trust was set up.

Q. Was this conditioned upon the other?

A. Very definitely, otherwise it would never have happened.

Q. Would you have signed this if the other hadn't been signed?      A. No.

Q. And which one was signed first?

A. The other one.

Mr. Etter: I object; it doesn't give the jury a clear picture of what was intended or accomplished. It's incompetent, irrelevant and immaterial.

Mr. Erickson: We have no objection to the other agreement if counsel have it.

Mr. Etter: It's been on file in a court of record since April 25, 1948.

Mr. Erickson: We submit it shows dealings between the two principal defendants; if that isn't

(Testimony of James Anthony Allen.)

the whole picture the witness has a right to explain the whole picture.

The Court: Upon the objection made, the objection is overruled. The government has a right on cross-examination to offer certain exhibits, and that doesn't preclude the defendant from offering some other exhibit.

Mr. Etter: Exception.

The Court: Exhibit 129 admitted for what, if anything, worth. [1225]

(Whereupon, Plaintiff's Exhibit No. 129 for identification was admitted in evidence.)

### Cross-Examination

(Continued)

By Mr. Erickson:

Q. Mr. Allen, this agreement refers to certain stock agreed to be put up by yourself, J. A. Allen, and F. C. Keane, and the agreement reads as follows: "This agreement, made and entered into this 4th day of August, 1947, by and between F. C. Keane, of Wallace, Idaho, party of the first part, and J. A. Allen, of Spokane, Washington, party of the second part, both hereinafter called Trustors; and Eugene F. McCann and L. J. Randall, both of Wallace, Idaho, and Therrett Towles, of Spokane, Washington, parties of the third part, hereinafter called Trustees, Witnesseth: Whereas, it is the desire and intention of the Trustors to provide for and pay off a certain indebtedness due Pilot Silver-Lead Mines, Inc. and Lucky Friday Extension Min-

(Testimony of James Anthony Allen.)

ing Company, hereinafter set forth, and for that purpose the Trustors desire to create a trust as herein set forth, Now, therefore, the Trustors do hereby and by these presents make, constitute and appoint Eugene F. McCann, L. J. Randall, and Therrett Towles the Trustees under the terms and provisions of this trust agreement, all of said Trustees to serve without bond. The trustors do hereby mutually covenant and agree that there shall be turned over, delivered, placed and deposited with said [1226] Trustees forthwith the following described property, to-wit: Coeur d'Alene Consolidated Silver-Lead Mines, Inc., 525,000 shares"—were you to put up that 525,000 shares?

Mr. Etter: I object; I think the trust speaks for itself.

The Court: Overruled.

Mr. Etter: Exception.

A. No, the corporation put that up.

Q. Which corporation?

A. The Coeur d'Alene Consolidated.

Q. Pilot Silver Lead Mines, Inc., 300,000 shares; were you to put that up? A. No.

Mr. Etter: I'm going to object.

The Court: Same ruling.

Mr. Etter: Exception.

Q. The Lucky Friday? A. No.

Mr. Etter: Same objection.

The Court: Same ruling.

Mr. Etter: Exception.

(Testimony of James Anthony Allen.)

Q. Hunter Creek Mining Company?

A. The corporation.

The Court: It will be understood that you have an objection to all the questions relative to the stock in [1227] this exhibit, that is, relative to the named stock in the exhibit.

Q. Alma? A. The corporation.

Q. The Lexington Silver-Lead Mines, Inc., 400,000 shares, were you to put that up?

A. The corporation was to put it up.

Q. The Hunter Silver-Lead Mines, Inc., were you to put that up? A. The corporation, also.

Q. The Goldstone, 250,000 shares, were you to put that up? A. No.

Q. And the War Eagle Silver-Lead Mines, Inc., 250,000 shares, were you to put that up?

A. No, sir.

Q. And the cash, Coeur d'Alene Consolidated Silver-Lead Mines, Inc., \$25,000, were you to put that up? A. The corporation.

Q. And B. W. Porter, \$8,000 in cash, was Mr. Porter to put that up?

A. Mr. Keane wrote Mr. Porter a letter and advised him to pay it into the trustees.

Q. Now, why did you sign and agree to that on behalf of these corporations of which you are in control if you did not steal or embezzle some of the money? [1228]

Mr. Etter: Just a minute; I'm going to object on the ground that the reason would be perfectly



(Testimony of James Anthony Allen.)

ascertained and set forth from the agreement not here.

The Court: Overruled.

Mr. Etter: Exception.

The Court: That's a reason for the objection. I may say this, that I will cause you to reframe the question. You may ask him why he signed that if he was not responsible.

Q. (By Mr. Erickson): Yes. Why did you sign this agreement if you were not responsible?

A. Because we had the interest of the stockholders and the corporations at heart, to clean them up, and it's the very thing that I had been trying to get Keane to do for a year and a half, to make such a disclosure and what money was his personal money and what belonged to corporations that he was in control of and handling the cash.

Q. So you were willing to sign an agreement to pay up indebtedness of the Lucky Friday Extension and the Pilot, although you were not a participant?

A. That is exactly right, and that agreement does not indicate that at all, Mr. Erickson; it indicates that these stocks are put in that trust for the purpose of liquidating the indebtedness, and by that, Mr. Keane's and Judge Featherstone's lawsuits, they would have been liquidated, [1229] and they're attempting to try and reopen that and claiming \$70,000 for himself. I might add, in the complaint, the day Judge Featherstone signed that he accepted a check from me for the Northwest Powder Com-

(Testimony of James Anthony Allen.)

pany for \$275.00, which is named in the complaint. You wonder why a complaint was made, when you try to do anything with the legal circles in Wallace or the courts in Wallace.

Q. So you feel you were not responsible in any way for the shortages to Lucky Friday Extension or the Pilot Silver Lead, but still you signed this agreement? A. Absolutely right.

Q. You did that in a benevolent and philanthropic——

Mr. Etter: Just a minute; if that isn't argument—I object to it on that ground, purely improper cross-examination.

The Court: Most cross-examination is argument, counsel; I will sustain the objection, but if we will eliminate all cross-examination that's argumentative, there will be very little cross-examination.

Mr. Etter: I grant you that, your Honor. I think there are degrees.

Q. (By Mr. Erickson): What consideration did the Coeur d'Alene Consolidated Silver Lead Mines receive from putting up 525,000 shares of stock in pursuance to this trust agreement? [1230]

A. What consideration did they receive?

Q. Yes; you said the corporation put up the stock.

A. Mr. Denney informed me in 1947 that upon his investigation into the Idaho First National Bank, if you'll refer to Mr. Randall's audit of the Lucky Friday Extension, you'll note that he has a——

(Testimony of James Anthony Allen.)

Mr. Erickson: I move the answer be stricken.

A. I want to explain it to you, Mr. Erickson.

The Court: I'll strike it, because I can't tell how much is a statement of the witness and how much is a statement of Mr. Denney and how much is answer to the question. You may read the question. You were asked what consideration this corporation got, and you may answer that if you know.

A. I know from Mr. Denney's investigation when he came into the office that he had gone into the Idaho First National Bank——

Mr. Erickson: I move the answer be stricken.

The Court: Yes; you may say if you know.

A. I know from Mr. Denney that it was \$25,000, \$20,000 of which was from the \$40,000 check of the Pilot money.

Q. All right; what consideration did the Pilot Silver Lead Mines receive for 300,000 shares of stock?

A. You're reading that wrong, are you not?

Q. Well, the Pilot you said put up 300,000 shares of stock. [1231]

A. That was Mr. Keane's stock, as I recall it.

Q. Oh, that was Keane's stock?

A. He had charged me once with selling it at ten cents.

Q. Did 200,000 shares of that come from Grismer?

A. That I couldn't say, because the manner in

(Testimony of James Anthony Allen.)

which they handled the stock certificates in the office is not known to me, and I believe he testified they had been endorsed in blank, and then drawn off whichever way.

Q. What consideration did the Hunter Creek Mining Company get for the 100,000 shares of stock it put up? A. It didn't put it up.

Q. Well, who put up the 100,000 shares?

A. It hasn't been put up yet.

Q. And the Alma Mining Company, 400,000?

A. You say what consideration did they receive?

Q. Yes.

A. Nothing more than Keane's interest, to which he claimed a one-third interest in all claims.

Q. And the Lexington Silver Lead Mines, what consideration did they receive for 400,000 shares?

A. Nothing more than to compromise the lawsuit.

Q. And what consideration did the Hunter Silver Lead Mines receive for 350,000 shares?

A. The same, to compromise the lawsuit.

Q. So that all these companies were interested in compromising [1232] the lawsuit, agreed to put up the stock to get rid of the lawsuit?

A. Exactly, and to make whole if they could the Pilot and the Extension, because of Keane's defalcations in it.

Q. The other companies were interested in making good his defalcations?

A. When they were named in the lawsuit as

(Testimony of James Anthony Allen.)

having an interest in them by Keane, you can always effect a compromise.

Q. I hand you Montana Leasing Company check, exhibit 8-c-1, signed by yourself to Kent & Rusch for \$59.99, and ask you what that is for?

A. That is for insurance on my cars that I used in mining business.

Q. I hand you Plaintiff's identification 8-c-2, a check from the Montana Leasing Company signed by yourself to the Inland Empire Racing Association for \$200.00.

A. That's for my box at the race track, which would be charged against me personally in the corporation.

Q. The corporation would later make a charge to you personally?

A. According to the way Keane was to keep records, that would be right.

Q. Did you have an understanding with Keane about that?      A. Oh, indeed.

Q. I refer you to Plaintiff's Exhibit No. 39, the escrow [1233] agreement between Coeur d'Alene Mines Corporation, signed by R. E. Jacobs, President, and Coeur d'Alene Consolidated Silver Lead Mines, by J. A. Allen, President, and ask you to state what that transaction was, Mr. Allen, the transaction there involving the check for \$25,000?

A. This was pursuant to agreement gotten up by Mr. Keane and Mr. Horning, and at the time Mr. Keane was president of the Coeur d'Alene



(Testimony of James Anthony Allen.)

Consolidated. My understanding is that Mr. Keane received this cashier's check from the Idaho First National, payable to the Coeur d'Alene Mines Corporation, gave it to Mr. Horning; Mr. Horning deleted this part of the thing, Mr. Horning carried it in his pocket until May 23, and on May 23 Grismer and I went into his office as directors of the Coeur d'Alene Consolidated, and the check was handed to the Coeur d'Alene Mines at a meeting at 7:30 on May 23.

Q. Do you know where this \$25,000 came from?

A. My understanding at that time was Mr. Keane was borrowing Mr. Gyde's money of \$15,000. Mr. Horning and others were to put up cash also, and Mr. Keane said he would take care of it all.

Q. This is your signature that appears on there?

A. That is right, it is my signature.

Q. You say that Keane was president, although you signed it?

A. On the day before, Mr. Keane was president. He resigned [1234] through the minutes, the minutes indicate he resigned in February, but the Coeur d'Alene Mines Corporation have a letter of April 22 wherein he signed it as president of the Coeur d'Alene Consolidated, when the agreement was first entered into.

Q. This agreement is dated May 23; you say Keane resigned May 22?

A. I presume he did, because he was acting as president up until the date of the agreement.

(Testimony of James Anthony Allen.)

Q. Did you have some discussions with Keane about the embezzlement of that money from the Pilot? A. No, Mr. Erickson, I did not.

Q. You state that you had no conversations with Mr. Elmer Johnston of Spokane about the preparation of the Pilot prospectus?

A. About the preparation of the Pilot prospectus?

Q. Yes. A. Not specific, to my knowledge.

Q. Well, as a matter of fact, Mr. Johnston sent you carbon copies of most of the letters that he wrote about the—well, I'll ask you if he did about the Lucky Friday Extension Mining Company prospectus for the second issue, the supplemental prospectus for the second issue, if he discussed that with you? A. I don't think so. [1235]

Q. I'll hand you Plaintiff's Exhibit 87, a letter by Elmer Johnston to the Lucky Friday Extension Mining Company; it's noted on the bottom "copy to J. A. Allen;" did you receive a copy of that?

A. Not to my knowledge, Mr. Erickson, that I can recall. This is on January 11, 1946.

Q. Yes, that was about the time of the second issue, as I recall it, of the Extension; the second public offering to the brokers of 300,000 shares.

A. On many occasions I have transmitted information back and forth from Mr. Johnston to Mr. Keane, and on some occasions I have carried papers to Mr. Johnston from Mr. Keane, but as to the details in connection with it, I couldn't state.

Q. Well, you certainly had nothing to do with

(Testimony of James Anthony Allen.)

aiding Mr. Johnston in preparing the prospectus, then?

A. Mr. Johnston is an S.E.C. expert, I am not; I did not.

Q. Was it Mr. Elmer Johnston of Spokane who advised you that the consent injunction obtained in the Western District of Washington was not in effect in 1943? I'll withdraw that question. Was it Mr. Johnston that advised you, Elmer Johnston advised you that the injunction would not prohibit you from filing under regulation A of the Securities Act?

A. You say that it would not prohibit me? [1236]

Q. Yes.

A. I don't remember any such. I didn't make such a statement as that.

Q. Didn't you testify on direct examination that Elmer Johnston told you that it wouldn't affect you under regulation A, for an issue under \$100,000?

A. I don't believe I did.

Mr. Emigh: I don't think there was anything said about regulation A; there was something said about \$100,000.

A. I think Mr. Johnston advised that a full registration, but as to what to do with regulation A, or the \$100,000, I don't know.

Q. Well, who advised you that the restriction as to your companies did not apply in 1943, if anyone did? A. What is that?

Q. Who advised you that the restriction did not

(Testimony of James Anthony Allen.)

apply in 1943 as to your being a promoter in the company, if anyone so advised you?

A. I don't believe anyone advised, in 1943.

Q. I thought you testified this morning that you were advised by someone that the prohibition didn't apply to you?

A. I think you're wholly mistaken in what I testified. I think I stated that it was my understanding, and I don't [1237] know when this information was given to me, but I think Mr. Stocking would know the law much better than I do, that at the time the consent decree was entered into, there were no prohibitions on it for a full registration.

Q. Did Mr. Johnston advise you that there were no prohibitions at the time the injunction was entered into?

A. I didn't say that, and I know that he didn't, because I made no inquiry on it.

Q. Mr. Allen, I'll hand you Plaintiff's Exhibit 114, in which 25,000 shares of stock were sold in Lucky Friday Extension Company, entitled "Sales by J. A. Allen of Lucky Friday Extension stock transferred from certificate 15 for 300,000 shares, issued on July 6, 1945, to F. C. Keane for legal services." You sold that stock, did you?

A. I did if that's the same stock, in November and December.

Q. By E. J. Gibson & Company?

A. That's right, through Helen Jorgenson, my wife's account.

(Testimony of James Anthony Allen.)

Q. That's your wife's maiden name?

A. That's right.

Q. And that is \$6,537.25, for 25,000 shares, which is about 26 cents a share?

A. I think I mentioned that this morning, yes, it shows on the schedule.

Q. What was the occasion for using your wife's maiden name in that transaction, Mr. Allen? [1238]

A. I'm very fond of my wife and family, Mr. Erickson, and it was not for any purpose to conceal any activity in the Extension stock.

Q. And that sale was made within a few months after the organization of the Lucky Friday Extension Company, was it not?

A. And as I understand, the stock in question was placed in the prospectus, and it was stated in the prospectus it would be sold at any time, even with the public offering, that it was known as free stock.

Q. How did you happen to get that stock from Keane?

A. I assigned to Mr. Keane an option that I had to purchase additional Delaware stock, which Mr. Keane did later purchase.

Q. How much stock have you sold, in dollars and cents, in the Lucky Friday Extension Mining Company and the Pilot Silver Lead Mines Company since you became interested in those companies, either in your wife's name or your name or your secretary's name or B. McLean's name?



(Testimony of James Anthony Allen.)

A. I'll answer it by this, that after we were left with the bare corporations, all the ramifications that came, most all the stock that was sold excepting what Keane sold, and I understand that was around \$40,000 worth, was sold through my accounts, and I would state that in the Extension stock, up until 1948, for which I am purchasing back [1239] some 300,000 shares of this at about seven or eight thousand dollars, would be \$73,423.01. That would be an average price of 8.966 cents for the price of the stock. As to the Pilot, I think it would be 525,000 shares at an average price of about three cents a share.

Q. I'll ask you if you did not receive approximately a hundred and forty or a hundred and fifty thousand dollars?

A. I say that's an absolute falsehood; I did not.

Q. Well, what would be the correct amount of your receipts from the sale of all stocks in Lucky Friday Extension and Pilot Silver Lead since either before or after you got control of the companies?

A. I think I have stated it right here, sixteen and seventy-three.

Q. How much does it amount to in money?

A. Well, that's pretty simple to figure; that would be \$89,000.

Q. And that was the money that you put into the Montana Leasing Company, that represented the personal monies, a large part of them, that you put into Montana Leasing?

(Testimony of James Anthony Allen.)

A. Oh, no; no, no. You've got the figures here, the amount of money that's gone into the Montana Leasing Company. I would say that from other sources and other stocks, that I have put in more money than what I have received by about \$80,000, than what I have received from the sale of the stock [1240] or what I would have drawn out of the Montana Leasing Company that would be chargeable against my personal account, in the period of time.

Q. Well, now, you were quite interested in Pilot at the time Mr. Grismer was working up there in the summer of 1946, were you not?

A. At what time in 1946?

Q. Well, I mean in July and August of 1946, when Mr. Grismer was working up there and complaining to you that the bills weren't being paid.

A. I think his complaints started in September and October, the same time as mine did.

Q. You weren't apprised of the fact that there wasn't money enough to cover the bills until that time?      A. I was not.

Q. So that you became suspicious of Keane at that time?

A. Grismer and I both did, and we made several trips to his house.

Q. I'm not asking about Grismer, but you became suspicious at that time?      A. I did.

Q. And you tried to find Mr. Keane and talk to him at that time?

(Testimony of James Anthony Allen.)

A. Well, he had been evading much prior to that, but it was never from any suspicion, I didn't attach too much suspicion [1241] to it, because he was dealing with such men as Judge Featherstone, Chas. Horning, and Mr. Hull, Gene McCann, his general law partner, was in his office in April during all the time the Pilot money came into the office and all the time it went out, and I felt—I don't know that I felt that, but in the light of him dealing with those men, there should be no reason for me to be put on notice that he wasn't handling the affairs of the company properly.

Q. You didn't even ask to see your Montana Leasing Company records?

A. I trusted him implicitly. We wanted audits since 1945, but Mr. Keane would say, "Just as soon as the Independence litigation is settled we'll have an audit of the three companies." The Independence was settled in June, 1946, for which at that time there was some \$40,000 went out of Pilot, and which we think went into Keane's account and out to Horning, Hull, McCann and Langroise, and we asked you to come in and I would submit my personal accounts to you in January, and you refused to do it.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: His answer may be yes or no, and

(Testimony of James Anthony Allen.)

all that he has said is purely volunteered. [1242]

A. If I may add a little more to that question——

Q. Just answer it first. A. I didn't ask?

Q. Yes. A. To see the Montana records?

Q. Yes.

A. I made several demands on them.

Q. Who did you make the demands to?

A. Irene Vermillion, in September.

Q. Did Irene Vermillion permit you to see them?

A. She did not; she told me that Keane told her I had been through for a long time, and that I would see nothing. I further went over to the S.E.C. office of Mr. Denney and Mr. Stocking in May of 1947 and asked them to subpoena the records.

Q. When did you go to Keane's home? Was it in September, or December, or October?

A. I would say sometime in October.

Q. And you think it was about 9:30 in the evening?

A. I am positive it was earlier than 9:30; perhaps 9 o'clock.

Q. I'll ask you if you didn't demand at that time that Keane turn the records over to you or you would do three things, disbar him, send him to the penitentiary, or break him?

A. I might have said break his neck.

Q. Well, I mean break him financially. [1243]

A. I said those three things, but I didn't say

(Testimony of James Anthony Allen.)

to turn over these records; I said to make a disclosure and to turn over and complete the Lexington Corporation, or there would only be three things could happen to him, he'd be disbarred and he'd go to the penitentiary.

Q. I'll ask you if you didn't tell Mrs. Keane that, either alone or in the presence of Keane?

A. I think that was told in the presence of Mrs. Keane, and I pleaded with her if she had any influence with Keane, to use it and make this disclosure and quit evading everybody.

Q. Did you demand the records at that time, and tell Mr. Keane that you had finances enough to handle the deal? A. I should say not.

Q. Did you tell the Keanes, either Mr. or Mrs. Keane, that this is going to cost \$200,000?

A. I never mentioned the sum of \$200,000. I told Keane that from all appearances it looked as though he was short about \$100,000 in some companies.

Mr. Erickson: That's all.

### Redirect Examination

By Mr. Etter:

Q. Mr. Allen, what primary education did you have?

A. I left Immaculate Conception School in Butte in the sixth grade.

Q. Sixth grade education?

A. That's right. [1244]

Q. Where did you get your later high school or grade school education?



(Testimony of James Anthony Allen.)

A. After I was married I took correspondence courses.

Q. From Gonzaga?

A. From Gonzaga and Northwestern Business College.

Q. What were you doing then?

A. Cutting meat and running a grocery store.

Q. All right; did you take further extension courses by correspondence?      A. Right.

Q. And a special tutor?      A. That's right.

Q. This law school education you have, when did you get that?

A. I finished that in 1937.

Q. And were you married at that time?

A. Yes, and had my two children.

Q. And what were you doing while you were taking that education?

A. I was working at the time.

Q. Getting back to this trust agreement, I'll ask if you ever discussed the terms of the trust agreement with Mr. Denney?      A. Many times.

Q. And when did you have the first discussion with Mr. Denney about this trust agreement setup?

A. I think I initiated the trust agreement for the purpose of [1245] cleaning up the companies.

Q. I'll ask you if Mr. Denney and the S.E.C. didn't know all about that trust agreement?

A. They were informed on it in May.

Q. And I'll ask you whether the S.E.C. and Mr. Denney had anything to do with the selection of the trustees in the trust agreement?

(Testimony of James Anthony Allen.)

A. If they had anything to do with the selection of them?

Q. Yes.

A. I don't know, than other it may have been a suggestion of Randall between the other two trustees.

Q. Did Mr. Denney ever mention that to you?

A. I think we discussed it with Mr. Denney.

Q. And how many times did you discuss the trust agreement that's here with the S.E.C. and Mr. Denney?

A. I can't enumerate them, they were so many times.

Q. And where did you have these discussions?

A. In my office.

Q. And what was the nature of the discussions?

A. Well, they were familiar with what we were doing in all respects.

Q. What were the nature of the discussions, Mr. Allen?

A. Well, the purpose was to make the companies whole.

Q. Well, did you discuss that?

A. Yes, indeed I did. [1246]

Q. All right; were any suggestions made by Mr. Denney in that respect?

A. Well, he thought it was a good idea.

Q. And did he make any suggestions about the stock held in the trust?

A. No, I don't believe——

(Testimony of James Anthony Allen.)

Q. As to sale?

A. Oh, as to sale, oh, yes. The stocks that are in the trust, excepting the Pilot and the Extension, would have to be registered before they could be sold.

Q. Was there any other suggestion made with respect to sale of any of the stocks?

A. I don't recall.

Q. Well, were any bids made for the purchase of any of the stock?

A. Oh, yes. We put in a bid, I forget what it was, for \$10,000 on certain blocks of the stock. McCann, Keane's law partner, rejected it on the basis that he didn't think it was sufficient. Mr. Denney did go to Wallace at that time and meet with two of the trustees and Mr. Langroise, and told them that he would like them to not turn any of the money back to the companies to the present directors, who were Grismer and myself. He didn't tell me direct, but Mr. Randall told me.

Q. Did you take it up then with Mr. Denney?

A. I think I did later on, and I believe he denied that he said it.

Mr. Etter: That's all. Before Mr. Allen leaves the stand, I have just conferred with counsel for the government, your Honor, and they will agree to stipulate that we may place in the evidence a copy of the original agreement which pertains to the trust agreement admitted in evidence as Exhibit 129. We have a copy of it, but it's not available

(Testimony of James Anthony Allen.)

here, but we want to accelerate the proceeding, so we will submit that.

The Court: You mean the agreement that you say accompanied the trust agreement?

Mr. Etter: Yes, your Honor.

Mr. Erickson: And I think further, while we're on that, that the figures should be filled in on these blanks here; this is obviously incomplete.

Mr. Towles: I can do that from this copy here.

Mr. Etter: Then it will be stipulated Mr. Towles will supply a complete agreement with all blanks filled in both agreements.

The Court: What is that agreement that you have here?

Mr. Erickson: This is 129.

Mr. Etter: We will stipulate that Mr. Towles will supply complete copies of the entire agreement with the [1248] figures in it.

Mr. Erickson: Then that may be substituted for 129, and 129 withdrawn when Mr. Towles substitutes the complete agreement.

Mr. Etter: It is so agreed.

The Court: All right.

Mr. Erickson: There are no further questions.

(Whereupon, there being no further questions, the defendant was excused as a witness, and resumed his place with his counsel.)

Mr. Etter: Subject, your Honor, to completing the record with the substitution of the exhibits which

have been stipulated for admission, the defendant rests.

The Court: The defendant rests, subject to completed and substituted exhibit 129 and accompanying agreement?

Mr. Etter: Yes, your Honor.

The Court: All right. Any rebuttal?

Mr. Erickson: Yes, we have some rebuttal?

The Court: Well, maybe we'll gain time by taking our recess now. There will be a ten minute recess.

(Short recess.)

(All parties present as before, and the trial was resumed.)

The Court: You may present your rebuttal testimony. [1249]

### ELEANOR KEANE

called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Stocking:

Q. Will you state your name, please?

A. Eleanor Keane.

Q. And are you the wife of the defendant F. C. Keane?

A. Yes, I am.

Q. You'll have to speak up, Mrs. Keane, so that all of the jury can hear you, please. You live at Wallace?

A. Yes, I do.



(Testimony of Eleanor Keane.)

Q. Do you know the defendant Allen?

A. Yes, I do.

Q. How long have you known him?

A. Since 1938.

Q. Now, with respect to a meeting at your home in 1946, do you have some recollection of the defendant Allen having a conversation with your husband there?

A. Yes, I do.

Q. And about what time would you fix that, what date, what time of the year?

A. I couldn't be sure of the date; it was in the fall, I believe.

Q. And that would be the fall of 1946?

A. Yes. [1250]

Q. You'll have to speak louder. I can hardly hear you, sitting here, and I know that the jurors over there are having difficulty. What time of the day or night was that visit made by the defendant?

A. He called on the telephone about 3 o'clock in the morning, and my husband answered the phone, and said he didn't wish to talk with him at that time, and I didn't get up, but my husband did, and he locked the front door, which is not a habit of ours.

Q. Which is what?

A. Not a habit of ours.

Q. Oh, I see, as to locking the front door?

A. Yes, thinking that if Mr. Allen came down, that he would leave. He pounded on the door and demanded——

(Testimony of Eleanor Keane.)

Q. Who pounded on the door?

A. Mr. Allen pounded on the door.

Q. And when was that with respect to the telephone call?

A. Probably fifteen minutes later.

Q. So shortly after 3 in the morning——

A. That's right, and demanded to be let in, and rather than disturb the neighborhood, my husband got up and let him in.

Q. And then what happened, Mrs. Keane?

A. I didn't get up, but I heard the—I heard loud voices, I mean I heard Mr. Allen's loud voice in the living room, and I didn't come out for about a half an hour or so, then [1251] I came out and told him that if he had anything to discuss with Mr. Keane, that I wish he would do it at his office and not at our home in the middle of the night.

Q. And what sort of a discussion did this appear to be, a friendly discussion?

A. No, it didn't appear to be friendly, although I didn't hear the conversation before I came out of the bedroom.

Q. Now, with respect to the conversation after you came out of the bedroom, do you have any recollection of any part of that conversation?

A. Yes, I do.

Q. What is your recollection?

A. He threatened him.

Q. Who is this?

A. Mr. Allen threatened my husband. He was

(Testimony of Eleanor Keane.)

quite abusive. He said that he would see that he would be disbarred, that he was going to break him, and that this thing or this deal was going to cost them \$200,000, and that my husband didn't have it, but that he did, and therefore my husband would go to the penitentiary, but he would not.

Q. What happened after that while you were there? A. Well, he wanted a drink.

Q. And what was Mr. Allen's condition at that time?

A. He appeared to be very intoxicated.

Q. And did he leave then, or did you give him a drink? [1252]

A. No, he didn't leave then. My husband went back to bed, thinking that if he left that Mr. Allen would leave, but he didn't leave.

Q. Did anybody make any request to him to leave?

A. I did. I called a taxi for him twice, and he wouldn't take it.

Q. And what time did he finally leave?

A. It was probably 5:30.

Q. Did he state for what purpose he wanted to remain there after your husband had left the room?

A. He wanted to go to sleep.

Q. And you didn't grant that permission?

A. I would not.

Q. And what was your husband's condition on that night with respect to whether or not he had been drinking?

(Testimony of Eleanor Keane.)

A. He was stone sober; he hadn't had a drink for over two months.

Q. Was your husband still awake when Mr. Allen left?      A. Yes.

Q. And he was in the bedroom?

A. That's right.

Q. What is the situation with regard to your home there, can you describe it?

A. We live in an apartment house with another family.

Q. On which floor do you live? [1253]

A. We live on the lower floor, and the other family lives upstairs.

Q. And what is the situation with regard to the proximity of the neighboring houses to your house?

A. They're very close together.

Q. What is it that fixes this conversation and this incident in your mind, Mrs. Keane?

A. I imagine the hour of the morning that he came down.

Q. Had anything ever happened like this before with Mr. Allen or with anybody else?

A. No.

Q. Now, was Mr. Allen down there, though, from time to time prior to this incident?

A. Frequently.

Q. And did you ever hear Mr. Allen make any statement concerning Mr. Keane, your husband, with respect as to whether or not he was, Mr. Keane was his partner?

(Testimony of Eleanor Keane.)

Mr. Etter: Object to that on the ground that there's not a proper foundation laid by that question for this witness, for the purpose of impeachment, if that's it.

The Court: Overruled. The defendant made the general complete statement as to all times and all persons. Objection overruled.

Mr. Etter: Exception.

Mr. Stocking: You may answer. [1254]

A. He's referred to him as his partner in my presence many times.

Mr. Stocking: That's all.

Mr. Etter: That's all.

(Whereupon, there being no further questions, the witness was excused.)

### FRANCIS CLAYTON KEANE

recalled as a witness on behalf of the plaintiff, in rebuttal, resumed the stand and testified further as follows:

#### Direct Examination

By Mr. Stocking:

Q. Mr. Keane, I'll show you what has been introduced in evidence as Plaintiff's Exhibit 127, which is a check written by Mr. Allen to cash on March 31, 1946, in the sum of \$2,890.30, bearing the endorsement of Rocky Mountain Cafe in Butte, Montana, and ask you if you have any knowledge as to what this check was given for?

A. Gambling.



(Testimony of Francis Clayton Keane.)

Q. And how did you obtain that knowledge?

A. Mr. Allen advised me of it.

Q. Did you have some discussion with Mr. Allen about the writing of that check?

A. We discussed at various times the various checks that had been written from time to time for gambling indebtedness, yes.

Q. Some of them had been written by you?

A. Some by me and some by him.

Q. And this particular check, you recall discussing it?

A. We discussed this check. There was a check of mine on or about that time for \$5,000, a gambling check. That was also discussed.

Q. Mr. Keane, do you recall a trust agreement that was entered into in the summer of 1947?

A. Yes.

Q. And do you have a—I'll show you——

A. I have an original here. I don't know whether that's an original or not.

Q. Is that a copy of the original, and I'm showing you Plaintiff's 129?

A. The one that I have here in my hand is an original of the agreement that Mr. Allen and I entered into in August of 1947. I don't know whether——

Q. Now, the one that you have in your hand that you have referred to as an original has in addition to the five pages referred to as trust agreement, a seven page instrument headed "Agreement" is that correct?

(Testimony of Francis Clayton Keane.)

A. That was entered into between Mr. Allen and myself. That is a copy, I think, of the trust agreement.

Q. Do you have any objection to our substituting——

The Court: Why don't you call that another exhibit, and then you can withdraw 129? [1256]

Mr. Stocking: All right.

(Whereupon, trust agreement and agreement were marked Plaintiff's Exhibit No. 130 for identification.)

Mr. Stocking: We'll offer 130 in evidence, and withdraw 129 if it is accepted in evidence.

Mr. Etter: To which we have no objection on either the withdrawal or the admission of the exhibit.

The Court: Exhibit 130 admitted, no objection. Exhibit 129 withdrawn.

(Whereupon, Plaintiff's Exhibit No. 129 was withdrawn.)

(Whereupon, Plaintiff's Exhibit No. 130 for identification was admitted in evidence.)

Q. (By Mr. Stocking): Now, I notice that in the trust agreement which is the second agreement in exhibit 130, that on the second page the amount of the indebtedness has not been filled in.

A. That is correct; it wasn't at the time the contract was prepared.

(Testimony of Francis Clayton Keane.)

Mr. Stocking: Mr. Towles has the figures that appear, now.

The Court: Well, if you can stipulate as to those figures.

Mr. Stocking: Do you have any objection to the figures [1257] being filled in on your copy of the agreement, Mr. Keane?

A. (The Witness): No.

The Court: If they're filled in I would suggest that if Mr. Towles fills them in that he initial the insertions. It may become important sometime.

Mr. Stocking: Now, on the blank spaces on page 2 of Exhibit 130 Mr. Therrett Towles, one of the attorneys for the defendant Allen, has filled in the figures as follows: The paragraph reads "The indebtedness for the payment of which this trust is created to the Pilot Silver Lead Mines, Inc., is" and the figures filled in by Mr. Towles were "\$73,-664.33," and continuing, reading paragraph 1, "and to the Lucky Friday Extension Mining Company is," Mr. Towles has filled in the figures "\$95,122.72" then the paragraph continues "as determined by the audit of the books and records" and Mr. Towles has initialed "T.T." on the margin, "6/16/49" indicating the date.

The Court: Is it agreed and stipulated by both sides that Exhibit 130 may have such figures filled in?

Mr. Etter: It is, your Honor.

The Court: And Mr. Stocking?

(Testimony of Francis Clayton Keane.)

Mr. Stocking: Yes.

The Court: All right.

Q. (By Mr. Stocking): There was some testimony as to who was to [1258] furnish the securities which were to go into the trust account and be sold for the purposes of this trust. I'll ask you with respect to these securities if you can tell me who was to furnish these securities: Coeur 'dAlene Consolidated Silver Lead Mines, Inc., 525,000 shares?

A. Who was to furnish that? Mr. Allen. I think that the contract speaks for itself, doesn't it? I think it so provides.

Q. You're talking about the agreement——

A. ——that was entered into between Mr. Allen and myself, yes. I was to put up 100,000 shares of Pilot stock, which I did, and I think that's the only contribution that I made in connection with that settlement, although I possibly could be in error on it, but that's my recollection.

Q. "This agreement made and entered into this 4th day of August, 1947, by and between F. C. Keane, of Wallace, Idaho, party of the first part, and J. A. Allen, of Spokane, Washington, party of the second part, Witnesseth: Whereas, the parties hereto are parties plaintiff and defendant in an action in the District Court of Shoshone County, Idaho, being No. 10224, involving their rights in certain mining stocks and properties which have become involved in certain possible liabilities; and Whereas, disputes and differences have arisen be-

(Testimony of Francis Clayton Keane.)

tween the parties hereto resulting in various claims and demands made by each party hereto [1259] against the other party; and Whereas, although the second party denies the claims and charges made by first party against second party in the complaint in said action, it is the desire and intent of the parties hereto to settle all disputes, differences, claims and demands, and to accomplish a full, final and complete settlement of them between the parties,

Now, therefore, the parties hereto, in consideration of their mutual covenants and agreements as hereinafter set forth, do hereby and by these presents promise, covenant and agree as follows: 1. A proposition has been submitted to the Independence Lead Mines Company, a corporation, to satisfy and discharge the indebtedness of said corporation in the approximate sum of \$150,000 claimed by said Independence Lead Mines Company to be owing by the Lexington Mining Company, Lexington Silver-Lead Mines, Inc., Montana Leasing Company, and other corporations and individuals, by the delivery to said Independence Lead Mines Company of certain stocks, cash, and a production note as hereinafter mentioned, upon certain promises and conditions, which proposition has been accepted by Independence Lead Mines Company. In fulfillment of said proposition, said second party promises and agrees to cause to be delivered to Independence Lead Mines Company \$5000 in cash on or before August



(Testimony of Francis Clayton Keane.)

6, 1947, \$7500 in cash on or before [1260] October 1, 1947, both of said payments to be made by or on behalf of Lexington Silver-Lead Mines, Inc.; A production note payable by Lexington Silver-Lead Mines, Inc., in the sum of \$87,500.00; 100,000 shares of Pilot Silver-Lead Mines, Inc.; 400,000 shares of Lexington Silver-Lead Mines, Inc.; 100,000 shares of Coeur d'Alene Consolidated Silver-Lead Mines, Inc.; 100,000 shares of Hunter Silver-Lead Mines, Inc.; 100,000 shares of Alma Mining Company (to be incorporated)."

Now, do you know whether that part of the agreement was executed by Mr. Allen?

A. I would want to go over those figures. There was certain stock put up. There was a delivery of 200,000 shares of Consolidated, that is Coeur d'Alene Consolidated, to me, and I don't know what other matters Mr. Allen took care of.

Q. All right; now paragraph 2 relates to this trust agreement which is attached, and which was previously Exhibit 129: "The parties hereto, as Trustors, have entered into a trust agreement dated August 4, 1947, a copy of which is attached to this agreement and by reference made a part hereof. Second party promises and agrees to cause to be delivered to the Trustees as specified in said trust agreement, \$8000 by B. W. Porter, and \$25,000 by Coeur d'Alene Consolidated Silver-Lead Mines, Inc. and all of the stocks listed and described in said trust agreement, [1261] except 100,000 shares of

(Testimony of Francis Clayton Keane.)

stock of Pilot Silver-Lead Mines, Inc., which shall be transferred and delivered to said Trustees by first party." And that was the 100,000 shares you stated was your obligation?

A. That is correct. I turned that over to the trustees.

Q. With respect to the delivery of the stock by the second party, was there any discussion as to the sources of that stock?

A. Well, it was to come out—no, there wasn't with me. Now, I did not engage in any discussions with reference to that contract, myself.

Mr. Etter: Now, just a minute——

A. My attorneys were making the contract for me.

Mr. Etter: Well, now, at this time, as far as any detailed examination of the contract, in view of the testimony of the witness that he didn't participate in any of the negotiations, I'm going to move to strike any testimony having to do with any interpretation of the agreement, other than the contract, which speaks for itself. I didn't know that.

The Court: Well, he's only testified to one thing; he says he turned over 100,000 shares of Pilot; as to the rest he says the contract speaks for itself. Now, what is there to strike?

Mr. Etter: If that's all that's material, I'll [1262] withdraw the motion. I thought there was some discussion of the terms.

The Court: Well, it's understood that Mr. Keane

(Testimony of Francis Clayton Keane.)

says he personally didn't discuss the terms of this contract, his attorney did, that it was his recollection that he was to turn over 100,000 shares of Pilot, and that he did, and that it was his opinion that the contract called for Allen to turn over the rest of the stock.

Mr. Etter: And I think the witness stated he wasn't present during the negotiation.

A. That is correct.

Q. (By Mr. Stocking): Do you know whether all the stock required to be turned over to the trustees by the trust agreement has been turned over?

A. Well, I'd have to base my answer on hearsay, necessarily.

Mr. Etter: I'll object.

The Court: Sustained.

Q. Do you have any recollection of the checks making up Plaintiff's 8-e-1?

The Court: That's already admitted, is it?

Q. Yes.

A. They are checks drawn on the Montana Leasing Company account.

Q. Yes; I asked you if you had any recollection of those particular checks? [1263]

A. No.

Q. You don't know, then, for what purpose they were drawn?

A. Well, I probably do, yes, but my answer would be founded on hearsay again.

(Testimony of Francis Clayton Keane.)

Q. I see. A. What I was told.

Q. Were you told by Mr. Allen?

A. I don't recall that he mentioned those particular items.

Q. Or by anybody in his presence?

A. Not that I recall of.

Mr. Stocking: That's all.

Mr. Etter: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Stocking: That's all the witnesses we're going to call, if the Court please.

The Court: The government rests?

Mr. Stocking: Yes.

Mr. Etter: One witness to recall.

The Court: All right, sur-rebuttal.

### JAMES ANTHONY ALLEN

the defendant, recalled as a witness in his own behalf, in sur-rebuttal, resumed the stand and testified further as follows:

#### Direct Examination

By Mr. Etter:

Q. I'm going to hand you this, marked Plaintiff's 127, Mr. [1264] Allen; you recognize that?

A. I do.

Q. And the date? A. March 31, 1946.

Q. All right, where were you—were you there at the time this check was cashed?

A. I was; there was Leon Goodman, who was

(Testimony of James Anthony Allen.)

running Mike's Trading Store here in Spokane, my wife, and myself.

Q. And what did you do with this check?

A. I got cash for part of that, and I had got part the week before, and that paid the entire bill.

Q. And was there any gambling by you or your wife or Mr. Leon Goodman at that time?

A. Not one penny.

Q. And did you ever have a discussion with Mr. Keane about this check as he's testified?

A. Never did.

Mr. Etter: That's all.

Mr. Erickson: No questions.

(Whereupon, there being no further questions, the defendant was excused as a witness and resumed his place with his counsel.)

Mr. Etter: That's all, your Honor; the defendant rests.

The Court: The defendant rests; the government [1265] rests?

Mr. Stocking: The government rests.

The Court: Both parties rest.

Mr. Emigh: We have a motion, your Honor.

The Court: Yes, I appreciate that.

\* \* \*

(Whereupon, the following proceedings were had without the presence of the jury and one alternate juror.)



The Court: All right, the jury has retired; you may proceed.

Mr. Emigh: May it please the Court, at this time the defendant James Anthony Allen presents to the court, and for convenience, in writing, a motion for judgment of [1267] acquittal, a copy of which will be delivered to the reporter, and we ask that it be made a part of the record of this case.

(Reporter's Note: Defendant's motion for judgment of acquittal is included in the clerk's transcript of pleadings in this case.)

The Court: The court has received a written motion for judgment of acquittal on behalf of the defendant Allen as to each of the seven counts. The court has noted the same, and has particularly noted the further reason that count seven should be dismissed upon the ground that Mr. Keane's testimony and character is such that the court is to have the jury completely disregard it, and is further to dismiss such charge against the defendant Allen. Said motion and each and every paragraph thereof is overruled and denied. Exception allowed. In the first instance, as far as the witness Keane is concerned, it's for the jury to determine, and not for me to determine, whether he told the truth, and the jury has a right to believe Mr. Keane and to disbelieve Mr. Allen. There has been much presented in this case that corroborates Mr. Keane and that disputes and contradicts Mr. Allen. Some juries might believe Mr. Keane and say that regardless

of his grave and serious errors and mistakes, that after he took the stand he told the truth. Other juries, and perhaps [1268] this jury, may not believe Mr. Keane at all, or may doubt sufficiently some of his testimony as to feel unable to separate the truth from the false, in which event the jury will be entitled to disregard entirely the testimony of Mr. Keane. However, in this case if Mr. Keane had chosen not to plead *nolo contendere*, and Mr. Keane was still here in this case as a defendant with Mr. Allen, and pleaded not guilty, and if Mr. Keane had determined not to take the stand, as would have been his right, and to have been completely silent, without the evidence of Mr. Keane at all there would have been enough to have taken the guilt or innocence of both and each, Mr. Keane and Mr. Allen, to the jury, and I'm satisfied that if Mr. Keane had pleaded not guilty and had refused to take the stand, and if nobody had the benefit of his evidence, that that would not have necessarily acquitted either Mr. Keane or Mr. Allen.

In other words, the circumstances of this case and the evidence in this case is sufficient to take the case to the jury against Mr. Allen, as I see it, completely disregarding and eliminating the testimony of Mr. Keane from the case. I have no right to eliminate and disregard that. He was under oath. Concededly much of what he testified was the truth; much of what he testified to was conceded or admitted by Mr. Allen. It may be that [1269] the portion that Mr. Allen denied was also the truth.

On the other hand, of course, Mr. Allen may have spoken the truth as to every discrepancy between him and Mr. Keane. That is the province and responsibility of the jury, but I think I should make clear to counsel that this jury, if it's convinced beyond all reasonable doubt of Mr. Allen's guilt from the other testimony in the case, completely disregarding the testimony of Mr. Keane, if they see fit to do so, would be entitled to convict Mr. Allen if the jury by virtue of the other testimony exclusive of that of Mr. Keane is convinced beyond all reasonable doubt of the guilt of Mr. Allen on one or more of the seven counts, including count seven, the conspiracy count; but aside from whether or not there is enough evidence without Mr. Keane, Mr. Keane's evidence is before the jury, and the jury has the right to accept it if it believes it; it has the right to reject it if it disbelieves Mr. Keane's testimony or believes that he intentionally testified falsely as to any material portion of his testimony, so the exception is noted. Now, are there any other motions?

Mr. Emigh: We have no further motions.

\* \* \*

(Whereupon, at 5:25 o'clock p.m., the Court took a recess in this cause until Friday, June 17, 1949, at 9 o'clock a.m.) [1274]

Friday, June 17, 1949, 9 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

(Whereupon, in the absence of the jury and one alternate juror, a further conference was held between the court and counsel and the defendant concerning the instructions proposed to be given to the jury.)

(Without objection, Defendant's Exhibits for identification D and K were withdrawn, upon motion of the defendant.)

(Whereupon, the following proceedings were had without the presence of the jury and one alternate juror.)

The Court: Now, we have something else, gentlemen. With respect to Exhibit 9 for identification, which is a large amount of slips beginning for the Montana Leasing Company in 1943, I admitted in evidence 9-a thereof, beginning June 14, 1945. The portion before June 14, 1945, has never been separated. Is there any reason that that portion of 9 preceding 9-a should not be eliminated so that it doesn't go to the jury?

Mr. Stocking: That would be satisfactory.

Mr. Etter: Satisfactory. [1275]

The Court: All right, it will be so eliminated. The jury may come in.

(Whereupon, the following proceedings were had within the presence of the jury and one alternate juror.) [1276]

\* \* \*

(Whereupon, counsel for the plaintiff and for the defendant presented their final arguments to the jury.)

(Whereupon, the following proceedings were had without the presence of the jury and one alternate juror.) [1281]

\* \* \*

(Whereupon, the following proceedings were had within the presence of the jury and one alternate juror.)

## COURT'S INSTRUCTIONS TO THE JURY

The Court: Members of the jury, you've heard the evidence in this case and the argument of counsel on both sides. You've now reached that stage in the trial where it's my duty to instruct you as to the law, and it's your duty to listen carefully to the instructions that I give you.

In Federal court the instructions are what are known as oral, that is, they're oral to you. You will receive no copy of what I say. They're oral to counsel; they likewise only know actually what the instructions are when they hear them spoken. They may be oral or written as far as I'm concerned. Frequently the instructions I give are entirely oral. While I think the language is not so excellent, I've sometimes thought that people understand better what's spoken than what is read. In some cases I give the instructions entirely from writing. In other cases, as you will find in this case, I combine some speaking, as I am now doing, and some writing, as [1284] I will later do, but again to you they are oral. You can only take to the jury room your recollection of the instructions as you hear them.



The instructions are vital. They are intended to and must guide you in your consideration of the evidence. They're to give you the law applicable in this case.

This is an important case. All cases are important to the parties involved. This case is important to the government. It is important to the defendant. It is important to the public. It is important to you as jurors, because you're interested under your oaths and by virtue of your duty as jurors of returning the correct verdict in each instance on the merits under the law and the evidence, free from sympathy for anyone, and free from prejudice against anyone. After I've instructed you you will upon direction retire to the jury room to consider of your verdicts as to the seven counts with respect to the defendant James Anthony Allen.

The grand jury has returned an indictment against the defendants James Anthony Allen, Francis Clayton Keane, and Joseph Valentine Grismer. The defendant, Francis Clayton Keane, has pleaded *nolo contendere* to each of the seven counts. The defendant, Joseph Valentine Grismer, has pleaded *nolo contendere* to count 7, the conspiracy count, and the first six counts were dismissed as to him. The disposition of the case as to those two defendants will be determined by the Federal Judge before whom they appear for sentence. It is expected that that Federal Judge will be Judge Driver, he having been the judge before whom those two pleaded *nolo contendere*. The defendant James

Anthony Allen having pleaded not guilty to the indictment and each of the seven counts, is now on trial before you and you are now concerned in this case as to the guilt or innocence of the defendant, James Anthony Allen.

Inasmuch as the defendant Allen, who is now on trial before you, entered a plea of not guilty to the indictment and each count thereof, that means that he denies every material allegation in the indictment, which places upon the government the burden of proving beyond a reasonable doubt every essential, material allegation as to each of the seven counts.

It is your duty and I am confident that you will do your duty as jurors under the oath you've taken to conscientiously and seriously return a true verdict as to each of the seven counts under the evidence and these instructions. You can readily understand that the government can only be maintained by the impartial enforcement of the law. You as jurors are not concerned with whether or not the laws here involved ought to have been enacted, nor are you concerned with any penalty or punishment which may be imposed under the statutes in this case in the event a verdict of guilty under one or more of the seven counts is returned against the defendant Allen. You are simply concerned with returning the correct [1286] verdict of guilty or not guilty as to each of the seven counts. In the event there is a verdict of guilty the responsibility will be mine, and in the event the sentence I should

impose would be too heavy, it would be my error and not yours. In the event I should be too lenient, the mistake would be mine, the fault mine, and in no wise yours. It is not the policy of the law that a verdict of guilty should be returned against anyone on trial unless such verdict is supported by the evidence beyond a reasonable doubt, but it likewise is against public policy that any guilty person should escape conviction if the evidence establishes beyond all reasonable doubt that he is guilty as charged.

It is my duty to instruct you as to the law governing this case, and it is your duty to take the law from me and accept that to be the law as stated to you by me, notwithstanding any statement or contention of any attorney as to what the law is or ought to be, and despite any opinion of your own that the law is different or ought to be different than I state it to you to be. The mere fact that you may not have favor for any particular law, or laws, cannot rightfully be by you permitted to influence you at all in arriving at a verdict as to any of the seven counts here involved.

You are instructed that the law in an American court presumes every defendant in every trial and as to every type of charge to be innocent until he is proven guilty by the [1287] evidence beyond a reasonable doubt. This presumption is not a mere matter of form, but is a substantial right of every defendant in every case, as well as a substantial part of the law of the land, and it continues throughout the entire trial and until the jury finds that this

presumption has been overcome by the evidence beyond a reasonable doubt. If after the jury has considered all the evidence produced, it then is convinced beyond all reasonable doubt that the defendant is guilty as charged, then the presumption of innocence is overcome by the proof of guilt, and such presumption of innocence disappears from the case, and it becomes the duty of an honest jury to return a verdict of guilty.

The indictment filed in this cause is merely the method provided by law whereby the United States, through a grand jury, and on behalf of the people, shall accuse or charge one or more persons of violation of the criminal laws of the United States, and whereby the one or ones accused shall be informed of the accusations against him or them that he or they may defend against such. The fact that an indictment has been found and returned by the grand jury gives rise to no inference whatsoever that the defendant Allen is guilty of any offense mentioned in these instructions or mentioned in the indictment. The guilt of any defendant who pleads not guilty can only be established by proof at the trial of his guilt beyond all reasonable doubt, and such proof must be by [1288] the evidence; the indictment is not the slightest evidence at all.

The instructions which I am giving you are merely the method provided by law whereby the Court shall advise you of the law applicable to this case. These instructions must guide you in the consideration of the evidence and in the determination of what your



verdicts as to each of the seven counts shall be. These instructions are to be by you understood, interpreted, and applied as a connected body and as an entirety. You will disregard any statement made by counsel on either side of this case as to what any testimony has been unless borne out by your final recollection thereof. You are, likewise, to disregard any testimony which may have been stricken by the Court, and you must, likewise, disregard any question or answer thereto to which the Court sustained an objection.

You've been told that the evidence must establish the guilt of a defendant in an American court as to every charge beyond all reasonable doubt. Therefore it is important that I advise you as to what is meant by proof beyond all reasonable doubt. Proof beyond all reasonable doubt does not necessarily mean that the evidence shall establish the guilt of the defendant beyond all possible doubt. The law does not require absolute certainty of guilt before there can be a verdict of guilty at the hands of a jury. While the law does not require proof of guilt to an absolute certainty, or beyond all possible [1289] doubt, the law does require proof of the guilt of the defendant beyond all reasonable doubt before there can be a conviction. The expression "reasonable doubt" means in law just what the words imply—a doubt founded upon some good reason. A reasonable doubt must arise from the evidence, or lack of evidence. Neither sympathy nor the desire of a jury to avoid performing a dis-



agreeable duty constitutes a reasonable doubt. Neither a mere whim nor a vague, conjectural doubt founded upon mere possibilities, but not founded on reason, constitutes a reasonable doubt. A reasonable doubt is such a doubt as a sensible, honest-minded man or woman would reasonably entertain in an honest and impartial investigation to ascertain the truth about a matter as important and serious as are the matters involved in this trial.

In order to warrant conviction as to the seven counts, or any of them, the evidence need not be so strong as to exclude all doubt or possibility of error, but in order to warrant conviction as to any count, the evidence as to such count must be strong enough to exclude all reasonable doubt, that is, strong enough to exclude all doubt based on reason. If, after considering all the evidence in this case, you can say that such leaves in your mind a firm, conscientious and abiding conviction of the guilt of the defendant James Anthony Allen as to any count or counts, then you are convinced beyond a reasonable doubt of the guilt of said defendant as to said [1290] count or counts, and then it would be your duty to find said defendant James Anthony Allen guilty as to such count or counts. On the other hand, if after considering all the evidence in the case you do not have a firm, conscientious and abiding conviction of the guilt of the defendant James Anthony Allen as to any count or counts, then you have a reasonable doubt as to such count or counts and then it would be your duty to find

said defendant not guilty as to such count or counts. Proof beyond all reasonable doubt has frequently been defined as "proof to a moral certainty", but, while the proof must be strong enough to constitute a moral certainty of the guilt of the defendant on trial, it need not be strong enough to constitute an absolute certainty.

The indictment in this case is brought under three different statutes, namely, the so-called mail fraud law, the National Securities Act, and the conspiracy statute. The first three counts charge violation of the mail fraud law, Section 338, Title 18, United States Code, which, as far as now material, reads as follows:

"Whoever, having devised, or intended to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises \* \* \* shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be [1291] placed any letter, postal card, package, writing, circular, pamphlet, or advertisement \* \* \* in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter to be sent or delivered by the post office establishment of the United States, or shall knowingly take or receive any such therefrom \* \* \* or shall knowingly cause to be delivered by mail according to the directions thereon \* \* \* shall be punished as therein provided.

The next three counts, counts 4, 5 and 6 of the indictment, charge a violation of Section 17-A of the Securities Act of 1933 as amended, being Title 15, United States Code, Section 77-q. This section reads as follows:

“It shall be unlawful for any person, in the sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly \* \* \* to employ any device, scheme or artifice to defraud.”

In the seventh count of the indictment it is charged that there was a conspiracy by the defendants Allen, Keane and Grismer and other persons to the grand jurors unknown, to commit violations of both the mail fraud law and of the [1292] securities act, including the violations charged in the first six counts, as well as other violations not necessarily charged in the first six counts. The conspiracy statute as far as this case is concerned reads as follows:

“If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy”  
is guilty of conspiracy.

With respect to counts 1, 2 and 3 of the indictment charging violation of the mail fraud law, you will note that the offense as described by the statute

I just read a little while ago to you consists of two parts, first, a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, and secondly, some particular act of using the United States Mails for the purpose of furthering or executing such scheme or artifice.

Count 1 charges that the defendant Grismer along with defendants Keane and Allen employed the scheme to defraud, and charged that for the purpose of executing this scheme and attempting so to do, the defendants on or about September 20, 1945, caused a letter to E. J. Gibson and Company, 5 Wall [1293] Street, Spokane, Washington, to be sent by the post office establishment of the United States.

Fraud alone against the public is not punishable under Federal law. It is only when the mails are used in some way in connection therewith that the Federal government can prosecute. After a fraudulent scheme has once been put into operation each letter or other article of mail matter placed in the mails or received through the mails in furtherance of the scheme, or caused to be delivered by mail to the addressee in furtherance of such scheme, is a separate offense. An indictment could charge as many counts of violation of the law as there were acts of mailing or using the mails in the operation of the scheme. The indictment in this case charges in addition to the letter mentioned in count 1, the letter mentioned in count 2 addressed to Ben Red-

field at Spokane, Washington, on June 13, 1946, and in count 3, the letter addressed to E. J. Gibson at Spokane, Washington, on May 25, 1946.

It is your duty as jurors to decide as to the defendant Allen first, whether there was such a scheme devised, conducted, joined in or participated in by the defendant Allen, and secondly, whether the letters described in each of the first three counts above mentioned were mailed pursuant to the scheme and for the purpose of executing and furthering same as alleged in the first three counts of the indictment. It is not necessary that you find that the evidence proves beyond [1294] all reasonable doubt that all of the elements of misrepresentation have been proved as to the defendant Allen, but it is sufficient in order to bring in a verdict of guilty as to counts 1 to 3 that you believe from the evidence beyond all reasonable doubt that the defendant Allen made or participated in the making of one or more of the essential acts or representations which I will later set forth, and that he made or participated in the scheme, and that the mails were used.

If the evidence fails to establish such essential elements which I will later more particularly advise you concerning, beyond all reasonable doubt, then it will be your duty to acquit the defendant Allen of the charges contained in counts 1 to 3 inclusive, or such ones of those three concerning which you have a reasonable doubt.

Counts 4, 5 and 6 of the indictment charge a



violation of Section 17-A of the Securities Act of 1933, which I have previously read to you so far as applicable to this case. These counts charge that the defendants employed the scheme to defraud described in the first count, and used such scheme as described in the first count in the sale of securities as charged in counts 4, 5 and 6 by the use of the United States mail. The Securities Act makes it an offense to employ such a scheme to defraud directly or indirectly in the sale of a security, and a security within the meaning of this law includes stock certificates in a mining company. In order that [1295] you should find the defendant Allen guilty of the offenses charged in counts 4, 5 and 6, you must find from the evidence beyond a reasonable doubt that the defendant Allen devised or helped devise or joined in or participated in the essential part or parts of a scheme to sell securities in interstate commerce or through the use of the mails, directly or indirectly, that such scheme was fraudulent, and that a device, scheme or artifice to defraud was employed by the defendant, and as to these three counts, counts 4, 5 and 6, the essential parts of such scheme or artifice in order to justify conviction will later be stated to you.

Just the same as with the mail fraud counts, it is not necessary that the evidence prove beyond all reasonable doubt each and all of the elements of misrepresentation set forth in the security fraud counts, and as referred to in count 1 of the indictment as to the defendant Allen to warrant a verdict

of guilty as to these security fraud counts, but it is necessary to justify conviction as to any of said security fraud counts that the evidence establish beyond all reasonable doubt that the essential elements of said three security fraud counts with respect to the defendant Allen is proved in accordance with the instructions I will later give you as to what the essential elements to permit conviction are.

Count 4 charges the use of the mails on August 8, 1945, to Edwin LaVigne of Spokane, Washington. Count 5 charges the use [1296] of the mails on May 28, 1946, to E. J. Gibson of Spokane, Washington, and count 6 charges the use of the mails on June 12, 1946, to Edwin LaVigne of Spokane, Washington, for the purpose of selling securities in interstate commerce. In these counts likewise it is not necessary that the defendant Allen himself used the mails if you find that the defendant Allen participated in the scheme or device to defraud knowing that the mails would be used by other co-defendants or employees in the perpetration of such scheme.

Count 7 charges a conspiracy among the three defendants named. The conspiracy statutes as passed by Congress and interpreted by the courts provides that when two or more persons enter into a conspiracy or combination to commit any offenses against the United States, all acts done by any of them during the life of the conspiracy in furtherance of and to effect the objects of the conspiracy and unlawful agreement are chargeable to all of

them. Such refers only to acts and statements made by the participants in the conspiracy and during the life and operation thereof. Anything done by any party either before the conspiracy began or after it ended will not be chargeable to any one other than the party himself. However, it is a part of the law that when a criminal scheme or conspiracy is in operation, a person joining it at any time thereafter with knowledge of such criminal scheme or such criminal conspiracy becomes a co-conspirator, and if it [1297] was previously only a scheme of one individual, by joining it he changes such to a conspiracy as well as continuing it as a scheme.

In the present case, and with respect to statements and activities of the defendant, the question therefore is first, whether there was in operation a conspiracy or unlawful agreement or understanding among the defendants named in the indictment or some of them to violate the mail fraud law or the Security Act as charged in the indictment. If you find beyond a reasonable doubt that Allen participated in such, whether from the beginning or later during any portion of the period charged, then anything he did in furtherance of such conspiracy would be chargeable to him and likewise anything that the other defendants or either of them did during the progress of such conspiracy while Allen was a member would be chargeable to Allen. This relates particularly to count 7 of this indictment, but as will be further stated, a scheme to defraud

when the scheme is conducted by two or more persons is in substance and effect also a conspiracy. Such principle holds true with respect to counts 1 to 6 inclusive of this indictment, which charge a violation of the mail fraud statute as to the first three counts and a violation of the National Securities Act as to the last three, providing you find beyond a reasonable doubt from the evidence that the defendant Allen participated with Keane and Grismer or either [1298] in connection with any such criminal scheme or conspiracy as charged.

Conspiracy may be established by circumstantial evidence or by deductions from facts. Common design is the essence of the crime of conspiracy, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together by common or different means, but if leading to the same unlawful result. If the parties act together to accomplish something unlawful a conspiracy is shown even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and actually unknown to the others. It is not necessary for the government to prove that the defendant Allen mailed any of the letters referred to in counts 1 to 6 of the indictment, or in count 7 of the indictment, if a fraudulent scheme were devised as alleged in the first 6 counts or a conspiracy was formed as alleged in the seventh count and if the defendant Allen participated therein knowing that in reasonable probability the mails



would be used for the purpose of aiding in the consummation of the scheme or the conspiracy, or if letters were mailed with the approval, knowledge or acquiescence of the defendant Allen, or if the defendant Allen knew that they would probably be or customarily be mailed by some other person in carrying out the scheme to defraud, even if they were mailed by a perfectly innocent person then the [1299] defendant Allen if there was actually such mailing would be just as guilty as if he had personally mailed the letter or letters himself.

The mail matter charged to have been mailed or delivered by mail in furtherance of a scheme to defraud may be, and frequently is, as perhaps it may seem in this case, entirely innocent on its behalf as far as its actual contents are concerned. Such mail matter need not be by itself effective to carry out the scheme, and need not be actually calculated to do so. It need not contain any misrepresentations or disclose any fraudulent purpose or show on its face that it was in furtherance of any scheme or artifice to defraud, but the mail matter mailed must have some relation to and be a step in the attempted execution of the scheme or conspiracy, and such mail matter must be mailed or caused to be mailed with intent to aid and further the purpose of the scheme or conspiracy.

Fraud within the meaning of the postal laws of the United States may be any trickery or deception, any false pretenses, representations or promises for the purpose of obtaining money or property of



another. This is true even when the persons resorting to such means intend to repay what they have obtained and intend to pay it without loss to the person or company at a later date, and even though the people who resort to such means intend to pay with interest or even profit or perhaps a bonus. It is not a good defense in a case of this sort that the defendants had confidence in the ultimate success of other mining enterprises other than the corporations in which stock was issued, and intended at some future date to repay any diverted money to the corporations from other sources, and that they expected ultimately to save the investors in the Pilot and Extension companies or either of them from loss, and even make a profit for them; if they intended to obtain the money or property of others by means of false representations or promises, there would be a violation of the law by the one so intending. The people to whom the money belonged were the ones who had a right to decide whether they wished the money diverted. They're the ones who had a right to say whether or not they wished to run such risk as there might be as to a bonus, profit, interest or future repayment.

Monies obtained from investors for the development of a particular mine upon a promise or representation that the particular mine will be developed by use of such funds must be used for that particular mine, and any diversion of money to a foreign purpose, however, meritorious that purpose

may be believed to be by the defendants, is a wrongful and criminal diversion.

The devising of an unlawful and fraudulent scheme or artifice is an act of the mind. You cannot possibly enter into any defendant's mind and by reason of such physical [1301] visitation determine his intention or purpose. The evidence of intent to devise and conduct such a scheme to defraud may be shown and usually must be shown by the acts and declarations of the parties concerned, and by the attendant circumstances as well as by direct evidence when direct evidence is available. Experience shows that positive proof of fraudulent intent is not generally to be expected. For that reason, among others, the law permits a resort to circumstantial evidence as a means of ascertaining the truth.

In order to constitute the offenses charged in this indictment it is not necessary to show that the defendants intended to defraud every person with whom they may have had dealings, or that the entire course of the transaction was a fraud. It is not necessary to show that all the monies of the companies were diverted. No defendant would have the right to represent that all the money was to be used for the development of a certain company, and then divert only five per cent or one per cent; neither is it necessary to show or prove that the scheme or artifice or the conspiracy was all developed at one time. It may have been formed gradually.

There will now be a recess for five minutes.

(Short recess)

(All parties present as before, and the trial was resumed.)

The Court: I realize, ladies and gentlemen of the jury, [1302] that the instructions, which are far from completed are long and difficult. The charge is complicated. There's seven counts, but if the defendants are guilty beyond all reasonable doubt they have no right to complain because they're charged with the complications which if they're guilty they constructed.

With respect to the several features of the scheme to defraud described in the first count of the indictment, you are instructed that it is necessary for the government to prove beyond a reasonable doubt at least some of the essential false pretenses, representations or promises therein charged and which I will later specify to you, were actually made. It is not necessary that all the allegations of the indictment be proved. However, it may all be proved. The government is only obligated to prove the essential ones. A scheme to defraud may be effected by one material misrepresentation, although where more are charged they may all be proved, but they need not all be proved.

To find the defendant Allen guilty of the offenses charged in any of the counts of the indictment it is not necessary to find that he committed personally all of the acts charged in such count or counts. The

law holds that anyone who knowingly aids, abets or counsels in the commission of a crime for the purpose of aiding such commission is legally as guilty as if he individually perpetrated the entire crime himself. One may join a conspiracy after it has been formed, or [1303] may join a scheme of one individual and thereby not only continue it as a scheme, but also make it a conspiracy, and if he participates knowingly for the purpose of aiding in the commission of a crime, he becomes a party thereto and is responsible just as though he was the one who originally conceived and planned the entire plan or conspiracy. One actor may drop out of a conspiracy and the others continue, or a new one may join, without the conspiracy terminating.

As I've already told you, a conspiracy may be proved either by direct or circumstantial evidence. It is not unusual for it to be proved by the use of circumstances. Men who agree to violate the statutes of the United States do not very often call in a stenographer and prepare a written agreement to that effect, or if they do, they do not usually make it available to any investigators. For this reason the law says that in a conspiracy case the government may be permitted to present its case on what the law calls circumstantial evidence. That is what the government is striving to do here. It contends that certain things happened and certain events occurred. It contends these could not have happened by mere coincidence unless there was an agreement or concert of action between at least two of the de-



defendants, therefore it asks you as the jury to consider that there must have been a conspiracy. The government has the right to so contend, yet when it does ask for a conviction on circumstantial evidence, then it has [1304] the burden not only of proving the facts and circumstances beyond all reasonable doubt, but it must also satisfy you beyond all reasonable doubt that such circumstances are only consistent with guilt. You must believe before you can find any defendant guilty in this cause that the circumstances proved as to him exclude all possibility, exclude all reasonable possibility of his innocence, and that after considering all the inferences reasonably to be drawn from the circumstances, your sound judgment requires you to reject other inferences and accept only the inference of guilt.

The law requires that you study all the evidence and that you weigh carefully the conclusions or the inferences favorable to the defendant as well as those unfavorable. The witnesses Francis C. Keane and Joseph V. Grismer in this case are confessedly what is known in law as accomplices. The fact that a witness is what is known as an accomplice doubtless operates and ought to operate largely against the credibility of his testimony, but the jury is not bound to reject such testimony merely because the witness is an accomplice. Accomplices are competent witnesses. Frequently the only proof of law infraction has to be through an accomplice or accomplices. It is your duty to consider the testimony of



Mr. Keane and Mr. Grismer and each of them, but in so doing you should weigh the testimony of each and scrutinize the testimony of each with great care. You are to test the truthfulness of each of them by inquiring into the probable motives which prompted their testimony, and are to decide to what extent such motives might have colored or warped it. You are to look into the testimony of other witnesses in the case for corroborating facts or circumstances; where the testimony of an accomplice is supported in material respects by trustworthy evidence or by the facts and circumstances which you find to have existed beyond a reasonable doubt, then you ought to credit the testimony of an accomplice, but where the testimony of an accomplice is unsupported and uncorroborated, you should not rely upon it unless after the exercise of great care and careful scrutiny it produces in your minds beyond all reasonable doubt the conviction of its truth, and in such event, if you believe the testimony of an accomplice to be true beyond all reasonable doubt, you're justified in convicting upon the testimony of that accomplice without any corroboration at all.

You are the exclusive judges of what is the evidence in this case and of the weight and credit to be given the testimony of each witness. In doing this you should take into consideration the conduct and demeanor of the witness while testifying, his or her apparent candor and frankness or lack of such qualities, the reasonableness or unreasonableness of his or her testimony, its probability or im-

probability as measured by your common experience in life, the opportunity on the part of any witness of knowing or being informed concerning the matters about which he testifies, his intelligence or her intelligence or lack of intelligence, any prejudice or bias disclosed by him or her, any motive in your judgment which would cause him or her to warp or color the testimony one way or the other, and the interest, if any, which he or she may have in the outcome of the case.

If you find that any witness in the trial of this cause either for the government or for the defendant has willfully, that is, intentionally and knowingly testified falsely as to any material fact, that is, as to any fact important in the case, then you are at liberty to disregard his or her entire testimony except insofar as such testimony is corroborated, that is, supported, by other testimony which you accept as worthy of belief, or as corroborated, that is, supported, by the facts and circumstances which you find to have existed under the evidence. These rules as to the testing of the testimony of any witness apply to the witness James Anthony Allen, the defendant on trial, as well as to each and every other witness in the case.

In the course of your deliberations you are not to consider in any manner sympathy for the defendant or members of his family, or any prejudice that you may have against him either personally or as a person engaged in mining enterprises, and if you are convinced beyond all reasonable doubt by

the evidence of the guilt of the defendant Allen as to any count [1307] or counts, it is your duty to convict him of such count or counts, and you must not permit any prejudice, if any you have against the defendant Keane, to interfere. This trial is not the measure of the respective merits or any merits of the defendants Keane and Allen. It is to determine whether or not the defendant Allen is guilty. The defendant Keane has already pleaded *nolo contendere*, and the Judge before whom he appears will determine his responsibility.

The defendant Allen cannot of course be found guilty of the commission of one or more of the offenses charged in counts 1 to 6 inclusive or of the conspiracy count, count 7, by proof alone that he aided, abetted, or counseled the doing of the overt acts charged in paragraph 2 of each of said first six counts, or the overt acts charged in count 7, unless and until you further find from all of the evidence in the case beyond all reasonable doubt that he did such knowingly and intentionally to effect the scheme, artifice or conspiracy charged.

You are instructed that any fraudulent act done or intent entertained by the defendant Keane not disclosed to the defendant Allen would not be binding upon the defendant Allen or chargeable against him even though he may have directly or indirectly profited thereby. In order for the defendant Allen to be responsible for any unlawful act on the part of the defendant Keane, the defendant Allen at the time he shared in any such profits must have

known that Keane had the scheme [1308] or was a part of the conspiracy charged. The defendant Allen is not charged in this case with the crime of embezzlement. This court would have no jurisdiction of a charge of embezzlement alone. Such a charge as far as the Lucky Friday Extension or Pilot companies would have to be prosecuted in the state courts, probably in the state courts of Idaho. Embezzlement, if there was such, becomes important only if the mails are used in connection with a scheme or conspiracy involving diversion of funds, either in connection with the scheme or conspiracy to violate the mail fraud law or the Federal Securities Act.

You are instructed that the defendant Allen had the legal right to sell any stock in the Pilot or Extension companies owned by him upon the following conditions: First, that such sale occurred after the expiration of one year after the date of the first offering of such corporation's stock for sale through an underwriter, or second, upon brokers transactions executed upon customer's order on any exchange or in the open or counter market, but not on the solicitation of such orders, but this right of the defendant to legally sell any such stock would only extend to such stock as he was selling independent of any criminal scheme or conspiracy to violate the mail fraud law or the securities act.

Again I may advise you that what punishment the defendant may receive in the event of his conviction of any count or [1309] counts is not to be



considered by you in any respect or for any purpose in arriving at your verdict. The matter of punishment is for the Court alone. When you retire to the jury room it will be your duty as jurors to confer with each other freely and frankly about and to discuss with each other honestly the many questions involved in this case, for the purpose of agreeing, if you can honestly do so, on an unanimous verdict as to each of the seven counts in the indictment; however, your verdict as to each of the seven counts must be the honest verdict of each and all of you.

While as I have already advised you the law of this case is for the judge, and it is your duty implicitly to accept and faithfully follow as correct all of the rulings that the Court has made in this case as well as to accept as correct the instructions now being given to you, I wish to tell you this further, that what the evidence shows, what weight you are to give the testimony of the various witnesses, and particularly what inferences you should draw from the facts and circumstances proved, are exclusively your function. In respect to that you are independent, controlled neither by any opinion that the court may have or that you think the court may have, and in the event you think that I have already, or come to think that I have expressed an opinion about the guilt or innocence of the defendant Allen, or as to the credibility or weight to be accorded any testimony of any witness, this is to [1310] let you know that you're not bound or controlled at all by



what the court thinks or by what you think the court thinks as to what the verdict should be. Such is your responsibility.

When a defendant testifies in his own behalf you may consider what interest he has in the outcome of the case and whether that interest has been sufficient to lead him to deny things that really are true, or to testify to things that are not true. You will weigh his testimony the same as you weigh the testimony of every other witness in the case.

There are two kinds of evidence, direct and circumstantial. Direct evidence is evidence of that which a person observes or sees, or which is susceptible of demonstration by the senses. Circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable inference or conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in every criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every reasonable theory except that of guilt. When circumstantial evidence is of that character, circumstantial evidence alone without any direct testimony at all is sufficient to convict, providing the jury is convinced beyond all reasonable doubt of the guilt of the defendant merely from circumstantial evidence, or if the jury is convinced [1311] by a combination of circumstantial and direct evidence of the guilt of the defend-

ant as charged beyond all reasonable doubt, then the jury should return a verdict of guilty upon such combination of evidence, providing it is consistent with guilt, inconsistent with innocence, and inconsistent with any reasonable theory except that of guilt, or if the jury is convinced by direct testimony of the guilt of the defendant as charged, beyond all reasonable doubt, it is the duty of the jury to convict upon such direct testimony, but again it must be consistent with guilt, inconsistent with innocence, and inconsistent with any reasonable theory except that of guilt.

You may find the defendant Allen, in the event you are convinced beyond all reasonable doubt of his guilt, guilty of all seven counts of the indictment, or you may find him not guilty as to each of the seven counts, or you may find him guilty as to some and not guilty as to others, depending upon whether or not you are convinced beyond all reasonable doubt as to such respective counts.

You are instructed that it is no defense that some other person or persons should also have been prosecuted.

It is not necessary to prove that the offenses charged in any count was or were committed upon the exact day alleged in the count. It is necessary that the evidence should show beyond a reasonable doubt that it was committed on or about the times or periods charged, and in any event, within three years before the return of the indictment, that is, at any time between May 6, 1945, and May 6, 1948.

When you retire to the jury room to deliberate upon your verdict you will select one of your number as foreman. You will consider your verdict as to each count separately, and will vote separately as to the guilt or innocence of the defendant as to each count. When all of you have agreed upon your verdict unanimously as to each of the seven counts, you will cause your foreman to fill in the verdict and sign such, and then you will return into open court. You will take with you to the jury room the exhibits which have been admitted in evidence, the indictment, and the form of verdict. The indictment is not in evidence and is not **proof of** anything, but will go with you to the jury room so that you will be better informed of the nature of the various counts and of the dates of the various letters alleged. The verdict is in the usual form, and reads as follows: "District Court of the United States, Eastern District of Washington, Northern Division. United States of America, Plaintiff, vs. James Anthony Allen, Defendant, C-7975. We the jury in the above entitled cause find the defendant James Anthony Allen blank guilty as charged in count 1, blank guilty as charged in count 2, blank guilty as charged in count 3, blank guilty as charged in count 4, blank guilty as charged in count 5, blank guilty as charged in count 6, and blank guilty as charged in count 7 of the indictment. [1313] Blank, foreman." When you have unanimously agreed as to your verdict as to each of the seven counts, you will cause your foreman to fill in the blanks as

follows: If as to count 1 you unanimously agree that the defendant Allen is guilty, you will cause your foreman to write in the word "is" in the blank before "guilty" so that it will read "is guilty." If you unanimously agree that your verdict as to count 1 should be not guilty, you will cause your foreman to write in the word "not" in the blank before "guilty" so that it will read "not guilty" and similarly as to each of the seven counts. You must have the foreman fill in the word "is" or the word "not" in each blank before each word "guilty" as to each of the seven counts, then your foreman will sign the verdict.

You may, as I've said, find him guilty as to some counts and not guilty as to others, or guilty as to all, or not guilty as to each one of the seven.

There are many exhibits which have been introduced in this case. It's not my intention to try to hurry you in arriving at your verdict. You of course are privileged to return your verdict quickly if you conscientiously arrive at such quickly, but the jury has a right and a duty to consider all the evidence and each and all of the many exhibits to that extent as is necessary or helpful to the jury in arriving at the correct verdict in each case, each count, to the best of the jury's ability. I think this is an appropriate time for [1314] a recess. There will be one of five minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)



The Court: There has been considerable mention in the argument by counsel on both sides as to what has been called Exhibit number 130, a combination of a trust agreement and a compromise agreement. You're not bound or controlled by any idea I may express as to the weight you should give that exhibit. You're privileged to give it the weight you think it is entitled to receive. I'm privileged to tell you, however, that personally I do not feel that that exhibit in any wise sufficiently weighs against the defendant to justify your returning any verdict against him on that account. It was a compromise, and it is generally the law that people make compromises for the purpose of settling that particular matter or matters, and that they do not expect to be held responsible on account of that settlement in some other transaction, and I'm letting you know that while you're free to give that exhibit the weight you think it is entitled to receive, that personally I consider that you'd be well justified in not holding that exhibit in any wise as against the defendant Allen.

You are instructed that in the event you are convinced by the evidence in this case beyond all reasonable doubt that [1315] the defendant Allen is guilty as charged of one or more of the counts of the indictment, it will be your duty to convict the defendant Allen of such count or counts regardless of how much more active in any such violation you may find some other person or persons to have been, regardless of whom you may find to have been the



originator of any scheme or conspiracy, regardless of whom you may find to have been the dominating individual in connection with it, regardless of whether or not ultimately there was a profit or loss from any such over-all transaction, regardless of how interested you may find him to have been in any central development project, regardless of whether or not he spent any money in gambling, regardless of whether or not the original Lucky Friday Mining Company, usually referred to as the Big Friday, had more to gain or did gain more from the organization of the Lucky Friday Extension Mining Company and the Pilot Silver Lead Mines, Inc., or either of them than did the defendant or either of them, regardless of whether or not the defendants Allen and Keane had differences and parted company, regardless of how justified Allen was in having Keane removed from any authority in the management of the companies or either of them, regardless of whether or not one John Sekulic was or was not the one who originally suggested the organization of the Extension Company, and regardless of whether or not after commission of such offenses Allen put in substantial sums in the Extension or Pilot or [1316] both.

However, in determining the guilt or innocence of the defendant Allen as to each of the counts, and in determining the reasonable probabilities and the reasonable credibilities, motives, and incentives of the respective witnesses including the defendant Allen, you should give serious consideration to each

and all of the foregoing as well as to all of the rest of the evidence, including the exhibits, and to all of the facts and the circumstances disclosed by the evidence, whether I've referred to such or not.

You are instructed that if a person knowingly, intentionally and willfully violates the law, he is responsible for such violation regardless of whether or not he is to get any profit therefrom and regardless of whether or not if he expected a profit the share he expects of any benefits or profits that may be realized is large or small, regardless of whether or not he actually obtains the share he expects or is completely disappointed, and regardless of whether or not his share is or is intended to be greater than, equal to, or very much smaller than that of some other person with whom he is associated, or greater than, equal to or less than that part of some innocent party or company who participates in some part of the activity.

While I have told you that if you find any witness on any side of this case, including the defendant, has willfully, [1317] that is, intentionally and knowingly, sworn falsely as to any material fact on the trial, that you are at liberty to disregard the entire testimony of such witness except as such has been corroborated, as I've told you, by other testimony or circumstances which you accept as true, this is to let you know that you do not have to disregard the entire testimony of a witness if you find that that witness has intentionally, willfully sworn falsely to some material fact. If you find that a witness has

willfully and intentionally sworn falsely as to some material matter or fact, and you further find that he has testified truthfully as to some other matter or matters, and you determine that you can separate the false from the true, while you are at liberty to disregard the entire testimony of such witness except as it has been corroborated, as I've already stated to you, you are not required to disregard that portion of his testimony which you find to be true, but if you find that any witness on any side of the case, including the defendant, has willfully sworn falsely as I've previously stated, as to any material matter, you're not required to undertake the difficult task of separating the chaff from the wheat, or the false from the true, and are at liberty to disregard all of the testimony which is not corroborated, that is, supported, as I've stated.

If you should find that any witness or witnesses have intentionally testified falsely as to any material matter in [1318] the trial, and if you have because of that decided to disregard the entire testimony of such witness or witnesses except as such has been corroborated, as I've stated to you, then you should determine whether or not the remaining evidence establishes the guilt of the defendant Allen beyond all reasonable doubt as to the seven counts or any of them. In the event it does so establish his guilt beyond all reasonable doubt as to the seven counts or some of them, then it will be your duty to return a verdict of guilty in accordance therewith regardless of the fact that you may have disregarded the

testimony of one or more witnesses for what you find to have been willfully false testimony. I'm not suggesting by this that I do or do not believe that the defendant Keane or the defendant Grismer or the defendant Allen or any other witness has willfully, knowingly or intentionally testified falsely as to any material matter. The determination of whether any witness or witnesses, including the defendant Allen, testified truthfully or otherwise is your responsibility.

In this case if you are convinced by such evidence as you consider worthy of belief, including the facts and circumstances which you find from the evidence existed, that the defendant Allen is guilty beyond all reasonable doubt as charged in one or more of the counts, it will be your duty to so find, regardless of how much or how little credence you may give to the testimony of the defendants Keane and Grismer or [1319] either of them.

In such connection, had the defendants Keane and Grismer or either of them come to trial before you in this case upon pleas of not guilty as to each and every count, along with the defendant Allen, and had either or both of the defendants Keane and Grismer declined, as they would have had the right to decline, to take the stand, so that there would have been no evidence from them or either of them, it would still have been your duty to have found each of the defendants including the defendant Allen guilty providing you were so convinced beyond all reasonable doubt from the evidence before



you without the testimony of Keane or Grismer or without the testimony of such one as did not testify. That is, you are instructed that the testimony of neither Keane or Grismer is necessary to the government's case against the defendant Allen providing you are convinced beyond all reasonable doubt of the guilt of the defendant Allen from the other testimony, including the exhibits, facts and circumstances proved in the case to your satisfaction beyond all reasonable doubt. However, if you should disregard the testimony of any witness or witnesses, whether or not it be that of Keane and Grismer or either of them, and are not convinced beyond all reasonable doubt by the remaining testimony of the guilt of the defendant Allen as to any count or counts, then you should acquit the defendant Allen as to such count or counts concerning which you find a [1320] lack of testimony.

If you find beyond all reasonable doubt that the defendant Allen under all the evidence which you consider as worthy of belief is guilty of one or more of the counts charged in the indictment, you should return a verdict to such effect, regardless of whether or not you find that the defendant Keane deceived and cheated the defendant Allen or attempted to do so, and regardless of whether or not Keane was as incapacitated from liquor as he testified. This prosecution is on behalf of the people of the United States, and if the evidence establishes the proof of the guilt of any person beyond all reasonable doubt, the fact, if it be a fact, that some



associate in the violation was disloyal to the defendant on trial, or was otherwise guilty of misconduct, will not relieve such defendant on trial from his responsibility to the government and to the public for the violation.

In connection with each of the first three counts of the indictment, in order to sustain a conviction it must be established by the evidence beyond all reasonable doubt in addition to the other requirements for conviction, that the defendant Allen knowingly, willfully and intentionally participated to some substantial degree in the scheme or artifice therein alleged, before the mailing of the particular letter charged in such mail fraud count. As to the next three counts in which fraud is charged in the sale of a security, in addition [1321] to the other requirements for conviction it is essential for conviction of the defendant Allen as to each of said Security Fraud counts that the evidence is established beyond all reasonable doubt that the defendant Allen knowingly, willfully and intentionally participated to some substantial degree in the scheme or artifice described in mail fraud count 1 and referred to in and made a part of each Security fraud count, before the mailing of the particular letter charged in such Security fraud count.

As to count 7, the conspiracy count, it is not necessary for conviction that the evidence establish that the defendant Allen joined such conspiracy at any particular time, providing the evidence establishes beyond all reasonable doubt that the defend-

ant Allen knowingly, willfully and intentionally joined and participated in any such conspiracy before May 6, 1948, when the indictment was returned, and also before the commission in Spokane, Washington, of any one or more of the overt acts consisting of mailing or delivery of mail in Spokane, Washington, charged in count 7 and relating to that company or these companies concerning which you find the defendant Allen beyond all reasonable doubt conspired. In this connection it will be your duty to find the defendant Allen guilty of such conspiracy count if you find from the evidence beyond a reasonable doubt that he so knowingly, willfully and intentionally joined and participated to some substantial degree in the conspiracy as [1322] charged either in connection with the Extension Company or the Pilot Company before the commission in Spokane, Washington, of at least one of the overt mailing acts charged and relating to that company concerning which you may find he conspired, even though he might not have had any connection with the other company, and even though some other person or persons may have participated from the beginning in such conspiracy and to a much greater extent.

You are advised that if a person by the doing of one act violates more than one Federal law he may be prosecuted by separate counts for the different violations of different laws arising out of the same action. In a conspiracy charge there must be at least two involved; while the conspiracy count

charges three, it's not necessary that the evidence establish that more than two were involved, but Mr. Allen cannot be convicted of conspiracy unless you find beyond all reasonable doubt that he conspired either with Keane or with Grismer.

You are instructed that you're justified in finding that the letters of notification and the prospectuses of the Pilot and Extension companies constituted representations. You have a right in considering the evidence to determine whether or not the defendant Allen's manner of keeping his records and receiving and paying money was in accord with his natural way of conducting his business, or whether it was willfully done for the purpose of hiding and concealing his true connections [1323] with the Pilot and the Extension or either of them, or whether it was for the purpose of carrying on his business in the usual way, or was for the purpose of confusing or harassing investigators.

In connection with this case, if you should find beyond all reasonable doubt that the defendant Allen knowingly, willfully and intentionally diverted money on or about August 7, 1945, and on or about August 28, 1945, which belonged to the Extension Company, or on either of such dates or on or about either of such dates, that that would be sufficient to connect him with diversion of funds as charged, even though you should not be convinced beyond all reasonable doubt as to other diversions, and in the event you should find beyond all reasonable doubt that he did knowingly, willfully and intentionally

divert money on or about either of the two dates of August 7 or August 28, 1945, and further find as charged in the indictment that such was done knowingly, willfully and intentionally as a participant, even for that temporary period, in the scheme charged and the conspiracy charged, such would justify conviction of the defendant Allen as to such of counts 1, 4 and 7 as you might find under the evidence the defendant Allen was guilty of beyond all reasonable doubt, providing the respective mailings charged were mailed after any such diversion, in the event you should so find.

As to count 1 of the indictment, in the event you find [1324] beyond all reasonable doubt that the defendant James Anthony Allen as charged devised, joined or participated in, willfully, knowingly and intentionally, any scheme or artifice to defraud purchasers and prospective purchasers of stock of the Lucky Friday Extension Mining Company, and that it was a part of such scheme, known to and participated in by such defendant Allen, that concealment would be made to the public and investors and prospective investors that Allen was a promoter of the Extension, and it also is established beyond a reasonable doubt that he was such a promoter before and during the organization of such companies, or if you're satisfied beyond all reasonable doubt in connection with count 1 that the defendant Allen knowingly, willfully and intentionally participated in the scheme knowing and intending that the Extension was to sell stock to investors upon the representation that the proceeds thereof would



be used by the corporation for the exploration and development of the mining property of the Extension, and that in fact, such, to the defendant's knowledge, was not so used, or that the defendant Allen knowingly, willfully and intentionally devised or joined in or participated in such scheme with the intention that a portion of the money due the corporation from its treasury stock would be appropriated and diverted from the Extension, or if the defendant Allen knowingly, willfully and intentionally joined in such scheme as to the Extension, intending and agreeing that [1325] certain stock would be given to any attorney under the pretense that it was for attorney's fees, but that actually a part of it would come back to him as a promoter, for the purpose of defrauding the public, and if you further find beyond all reasonable doubt that after joining any such scheme and in connection therewith, and pursuant to the intention, the letter charged in paragraph two of count 1 was delivered at Spokane, Washington, as charged, then it would be your duty to find the defendant Allen guilty in any of said events of count 1, otherwise not guilty as to count 1.

I'm making it clear to you that he can only be convicted as to count 1 in the event he knowingly, willfully and intentionally participated in the scheme in the method I have just stated with respect to the Extension Mining Company. That is because, although it's charged that he entered into a scheme both as to the Extension and the Pilot, the critical letter was mailed before the Pilot under the evidence



was organized or contemplated, so count 1 will only justify a conviction against the defendant Allen in the event he knowingly, willfully and intentionally devised, joined or participated to a reasonably substantial degree in the scheme in one of the ways I have stated.

As to counts 2 and 3, the defendant Allen can only be convicted in the event he knowingly, willfully and intentionally devised or helped devise, joined in or participated to a [1326] reasonably substantial degree in the same way or ways as to the Pilot Company as I have previously specified was necessary for the Extension, and then only if such devising, joining or participating was before the mailing and delivery of the letter mentioned in paragraph 2 of count 2, which was on June 13, 1946.

Similarly, as to count 3, the defendant can only be convicted as to count 3 provided he knowingly, willfully and intentionally devised or helped devise or joined in or participated to the same degree in a scheme involving the Pilot, and before May 25, 1946, the date mentioned in count 3.

As to counts 4, 5 and 6, he can only be convicted as to count 4 in the event he joined, devised, helped devise or participated similarly in a scheme involving the Extension—just a moment, was that count 4?

The Reporter: Yes, your Honor.

The Court: —in the Extension before the mailing and receipt of the communication alleged to have been sent or received on or about August 8, 1945, in the second paragraph of said count 4.

As to counts 5 and 6, the defendant Allen can only be convicted in the event you find such devising, joining or participating in a scheme involving the Pilot and before the respective letters therein involved.

As to each and every of said six counts, not only must you find such beyond all reasonable doubt, but you must find [1327] beyond all reasonable doubt that the letter was mailed or caused to be mailed or in the natural course of events should have been known by Allen that it would be mailed, and that it had for its purpose the furthering of the scheme as to the Extension in counts 1 and 4, and as to the Pilot in counts 2 and 3, 5 and 6.

As to count 7, you can only find the defendant Allen guilty in the event you find that he knowingly, willfully and intentionally devised or helped devise, joined or participated to a reasonably substantial degree in the conspiracy therein alleged, and that such conspiracy was for the purpose of doing at least one of the several things which I defined to you as necessary in order to justify conviction on count 1. and in addition, the evidence must establish beyond all reasonable doubt that the defendant either helped organize, joined in, or participated in such conspiracy knowingly, willfully and intentionally before the doing of at least one overt act in Spokane, Washington. The reason that such must have been done in Spokane, Washington, is to give this Federal Court in the State of Washington jurisdiction.

You shall consider all of the overt acts for such light as they may throw upon the guilt or innocence of the defendant. In addition, as to the conspiracy count, it is necessary that the particular overt act shall have consisted of the mailing or receiving through the mails of a letter or certificate [1328] related to the particular company concerning which the defendant Allen was involved in the conspiracy. If you find that the defendant Allen was involved in the conspiracy from the beginning, and as to both companies, then the commission of an overt act as to either company will suffice, but if you find that he was not involved in the Extension scheme or conspiracy, but do find beyond all reasonable doubt that he was involved in, as I've stated was necessary, a conspiracy involving the Pilot, it will be necessary for you to find that he joined or knowingly participated or knowingly joined, of course, such conspiracy before the mailing or the receiving in the mails at Spokane, Washington, of one of the letters relating to that particular company and described in the overt acts in the indictment.

You will have the indictment with you for your assistance and better understanding of the charges. It will be your duty to consider all this evidence carefully, impartially, dispassionately, for the purpose of arriving at the truth, and in doing such you will draw upon your experience, your judgment, your common sense, your understanding of the probabilities. You will remember at all times that you're officers of the court, under oath, charged

with the duty of returning the correct verdict as to each count, and because there are so many exhibits you cannot properly discharge your duty as jurors until you have sufficiently examined and understood the [1329] various exhibits as to permit you intelligently and honestly to return the proper verdict as to each count.

You should view this testimony and all of the facts and circumstances in the same light as if you had been dispatched for the honest purpose of investigating this case and determining as an investigator whether or not the defendant Allen was beyond all reasonable doubt guilty, and if you had been such an investigator conscientiously performing your duties as an investigator, and if you had had presented to you all of the facts and circumstances and exhibits as have been introduced in this case, what would your decision have been as to whether or not you were then satisfied as honest, conscientious investigators as to whether the defendant Allen was shown beyond all reasonable doubt to be guilty.

If you would then have decided conscientiously and honestly that he was guilty of one or more of the charges, it would be your duty to have the same view here. If under such circumstances you would have an honest, conscientious, reasonable doubt, it's your duty to have the same honest, conscientious, reasonable doubt here. In one event you should return a verdict of guilty, and in the other event of course a verdict of not guilty. You will now

retire, not to consider this case. You will retire until called.

(Whereupon, the following proceedings were had without the presence of the jury and one alternate juror.) [1330]

The Court: Is there any instruction that counsel on either side have counted on my giving and which I did not give?

Mr. Emigh: There was some discussion about an instruction, the court had some discussion with us on an instruction on attorney fee stock.

The Court: All right, any other?

Mr. Emigh: We have a number of objections and exceptions.

The Court: I understand that. I'm trying to find out if there's any I left out that you counted on my giving.

Mr. Emigh: I doubt that the court gave in substance some of the instructions we tendered.

The Court: Some of the instructions what?

Mr. Emigh: That the defendant tendered.

The Court: Well, I'm not asking that. I'm asking whether or not I failed to give any that you felt I indicated I would give, other than the attorneys' stock.

Mr. Emigh: Outside of that I believe not.

The Court: Any on the part of the government?

Mr. Erickson: I think they're adequate from our standpoint; you gave what we expected.

The Court: Does the government feel that the instructions given are in accordance with the law, or



does the government feel that the court has committed error which would require a new trial in the event of conviction?

Mr. Stocking: I'm just a little concerned, I was having [1331] a conference with Mr. Erickson, about the state of count 7, inasmuch as you haven't either eliminated that reference to the conspiracy to violate the registration provisions, or given an instruction.

The Court: I've stated that they had to find one or other of the matters which I specified was requisite for count 1.

Mr. Stocking: I see, so that it's coupled with the other counts, and they won't consider the registration count.

The Court: Exceptions.

Mr. Emigh: The defendant, may it please the Court, objects and excepts to the refusal of the court to give instruction numbered 3 tendered and requested by the defendant, in form or substance.

The Court: All right, you may proceed.

Mr. Emigh: The defendant objects and excepts to the refusal of the Court to give instruction number 6 in substance or form as tendered by the defendant.

The Court: All right.

Mr. Emigh: The defendant objects and excepts to the refusal of the court to give instruction number 7 in substance or form as tendered by the defendant. The defendant objects and excepts to the refusal of the court to give instruction number 8 in substance or form as tendered by the defendant. The defendant

objects and excepts to the refusal of the court [1332] to give instruction number 11 in substance or form as tendered by the defendant.

The Court: You may proceed.

Mr. Emigh: The defendant excepts and objects to the refusal of the court to give—well, I'm not positive about 12, your honor. The court gave an instruction similar to that.

The Court: I may tell you that I gave a substantial part of 13.

Mr. Emigh: I rather thought I caught it, but it was hard to keep track of them. The defendant excepts and objects to the refusal of the court to give instruction number 14 in substance or form as tendered by the defendant.

The Court: I think I gave it word for word.

Mr. Emigh: I'll withdraw that; I mismarked it. I think you did too.

The Court: All right.

Mr. Emigh: The defendant excepts and objects to the charge and instructions of the court in the following particulars, namely: That in giving of said charge and instructions the court used the term "investigate" in discussing the duty of the jurors to examine the exhibits, after referring to the exhibits, and without in any wise indicating to the jurors that this investigation should be taken and considered in conjunction with all other evidence in the case, including the oral testimony, and the use of the term [1333] "investigator" under the circumstances is misleading and prejudicial to the defendant and

eliminates their consideration of their duty in relation to these exhibits to examine them as jurors and not to investigate for the purpose of trying to find a reason to convict, as distinguished from an impartial investigation of all the facts.

That instruction as to count number 1 as given tended to permit the jury to consider misrepresentations not contained in the charge.

That the instruction as to credibility of accomplice is erroneous and misleading in this, to-wit, that the instruction included reference to the defendant Allen and the measuring of his testimony in the same respect as other witnesses, and required express evidence of corroboration as to his evidence to render the same acceptable to the jury, whereas as a matter of law that evidence is corroborated throughout and in relation to all facts by the presumption of innocence, which has the force and effect of evidence and makes the evidence of a defendant different from that of another person which has to be corroborated, whether it's evidence that's been impeached by contradictory statements or by any other means known to law, because that evidence, that of the defendant, is supported and corroborated sufficiently to make it acceptable, but not binding to the jury, without further corroboration.

That the court unduly accented, and without need therefor, [1334] to the prejudice of the defendant, the right of a defendant to complain about the instructions being lengthy, inasmuch as no complaint had been made by the defendant of the instructions being lengthy. This was a remark by the court; I doubt

that the court had in mind to indicate that we had been complaining about the instructions, but the jury was absent at the time just preceding the court's remark, and we feel that might have led the jury to believe that we were criticizing the length of the instructions.

The instructions are further objected and excepted to on the ground that in the form in which the instructions were given they tend to permit the jury to convict for aiding and abetting without participating in a conspiracy.

The instructions are further objected and excepted to as to the force and effect to be given in event the jury believed the defendant Allen had testified falsely in some part of his testimony, and requiring that such testimony be corroborated by—no—requiring that evidence not found to be false must be corroborated by other evidence, whereas the same is presumed to be corroborated by the presumption of innocence.

That the instructions permit the jury to find the defendant guilty of a conspiracy without the testimony of Keane or Grismer, whereas and under the state of the record there is no sufficient direct evidence without the use of the testimony of Keane or Grismer to establish the elements of the conspiracy [1335] charged, and that to find the elements of that conspiracy by circumstantial evidence, the jury should have been advised that such circumstantial evidence to establish that element must be consistent with but one hypothesis or one theory,

namely, guilt beyond a reasonable doubt, and cannot be consistent with innocence.

That the instructions in relation to the jury finding that Allen's way of keeping books was designed to conceal the state of the record is not based upon any evidence, and presupposes Allen's participation in some wrongful act without first advising the jury that in order to find the defendant Allen guilty of the failure to keep proper records of the corporation, it must be first established that he conspired with Keane or Grismer, particularly Keane in this particularity, because Keane was keeping the books, and not Allen, in the keeping of improper books. I believe that's the points that I took notes on, your honor.

The Court: All right; the jury may come in.

Mr. Emigh: And your honor, we wish to have an objection in the record as to the form of verdict—

The Court: You may.

Mr. Emigh: —as being confusing, misleading, and likely to result in an unforeseen prejudicial verdict against the defendant.

The Court: All right, the jury may come in. [1336]

(Whereupon, the following proceedings were had within the presence of the jury and one alternate juror.)

The Court: Members of the jury, the Clerk of the Court for your convenience and with the consent of counsel on both sides has prepared a list of the exhibits by number which have been admitted,



with a brief reference thereto, and they will be contained in various envelopes with the exhibit numbers indicated on the envelopes, so by referring to the list you may be able to look for, get and examine the respective exhibits. One exhibit, a picture, won't go in an envelope, so it will be outside.

I think I made it clear, but I wish to make it clear that all the evidence and all the circumstances which you find against the defendant as to any count and each and every part thereof must be established by the evidence to your satisfaction beyond all reasonable doubt, and while there are some more allegations in the charges than I mentioned as requisite for conviction, this is to let you know that the proof to your satisfaction of any portions of the charges other than one or more of the essentials which I specified with respect to count 1 and then by reference to the other counts, will not justify conviction, but if you find beyond all reasonable doubt one or more of the essentials that I specified to you, coupled with knowing, willful and intentional devising, joining or participation [1337] in the scheme or conspiracy, and also find the mailing as I've stated, such will substantiate conviction.

You of course will not consider any misrepresentation against the defendant Allen except such as was charged in count 1 of the indictment and by reference made a part of the other counts.

With respect to the instructions given, the court is satisfied that the defendant Allen and his attorneys in no wise objected to the length of the instructions or the complexity of such, and if any inference

was given by the court in that respect, the jury will certainly disregard such.

I might say the number of the counts and the nature of the charge required me to give a much longer charge or instructions than I wish I could have felt satisfied to have given.

I as an example said that you had a right to consider what your view would be if as honest, conscientious investigators you had investigated this matter with the honest, conscientious desire of arriving at the truth. In such connection I thought I made it plain to you, if I did not I would wish it understood that if you should so conduct an investigation it would be understood that you'd have all of the evidence presented to you, both exhibit and oral, as was presented here, and that you'd see the same manner of presentation by the individuals who appeared before you as the individuals [1338] displayed to you on the witness stand.

In the indictment it is charged that among other things, the defendants in order to conceal the true amount of stock issued to them would and did cause large blocks of stock to be issued to Elmer E. Johnston of Spokane, Washington, and James E. Gyde of Wallace, Idaho, under the pretense that such stock was in payment of attorneys' fees, with the secret arrangement that a portion of such stock or the proceeds from its sale would be turned back to the defendants. This is to let you know that if you find beyond all reasonable doubt that the defendant Allen knowingly, intentionally and willfully before the

organization of either of such companies entered into any such agreement with such attorneys or either of them with the understanding that he was to get back part of such stock because he was a promoter, and so as to conceal such, that that would justify you in finding that he was a promoter, but you are instructed that if the evidence convinces you that Allen received any such stock and sold same to his profit, that that would not alone justify you in finding any guilt on the part of the defendant Allen unless you further find beyond all reasonable doubt that such was done knowingly, willfully and intentionally by him in pursuance of a scheme or conspiracy to defraud and use the mails as a secret promoter as charged in the indictment, but if you find that Allen got some of that stock and sold it, that alone does not constitute any [1340] basis for conviction of the defendant Allen. The bailiffs may come forward and be sworn.

(Whereupon, Irene Keenan and R. R. Isaacs were sworn as bailiffs.)

The Court: You will take with you the exhibits, the form of verdict, the indictment, not as evidence, but merely as an aid to your memory, your recollection of the instructions, and your consciousness of the fact that you are jurors under oath and you will talk with each other just as much as may be helpful or necessary about every element of this case, about every witness, and every exhibit, and you'll give due regard to each other's opinion with the aim of arriv-

ing at a unanimous verdict as to each count, if you can honestly do so. There's no reason at all that you should endeavor to try to hurry your decision until you can actually unanimously and honestly agree as to each count. If that means you can't do that until tomorrow afternoon, that's all right. If you can't do it until Sunday, it's your duty not to return your verdict until Sunday or such further time as is requisite for you performing your duties as jurors.

You may retire to consider your verdict. Just a moment; the alternate juror is especially thanked by the court for his services. He's now discharged. You've been a reserve soldier; you might have been essential. I'll tell you one thing; you're not obliged to tell anybody what your [13-40] verdict might have been. If anybody asks you what your verdict would have been, you can say you don't care to comment, and as a matter of fact, you don't know what your verdict would have been; you might have an idea one way, but if you were to retire to the jury room and examine these exhibits and get the views of these eleven other jurors you might find the verdict you would return was just exactly the opposite from what you would have returned alone, so you have no obligation to tell anyone. Thank you, and you're excused.

(Whereupon, the alternate juror was excused from further service in this cause.)

The Court: The jury will retire. If dinner is ready now I think they should go right away. That's

subject, however, to the jury's decision. I'd like counsel to remain.

(Whereupon, the jury retired to deliberate upon its verdict.)

The Court: Are there any exceptions by the defendant to the further instructions that I gave?

Mr. Emigh: Not to the further instructions.

(Whereupon, at 6:45 o'clock P. M. the court took a recess in this cause subject to call.)

Saturday, June 18, 1949, 11 o'clock A. M.

(Whereupon, the court convened in the absence of the jury, Mr. Erickson, Mr. Stocking, Mr. Emigh, and the defendant being present.)

The Court: I'd like to speak off the record for a few moments or longer than a few moments if the parties are agreeable. Is that satisfactory, Mr. Emigh?

Mr. Emigh: Sir?

The Court: I'd like to speak off the record for a few minutes if I may; is that satisfactory?

Mr. Emigh: Yes.

The Court: Mr. Stocking?

Mr. Stocking: Yes.

(Discussion off the record.)

The Court: All right, we'll put this on the record. I have advised you gentlemen that after giving consideration and thought over the night and this



morning to the objections made by defense counsel in argument to the jury of the general nature of the indictment and the various counts thereof and to the numerous charges therein contained, that probably it would be proper for the court today by instructions which I have prepared and read to you, to advise the jury in each instance that it was essential for conviction as to any count that the [1342] scheme in counts 1 to 6 in each instance should have contemplated the intention by the defendant Allen that funds of the appropriate company covered by the count letter should be diverted, and that if such was not a purpose of the scheme, that the defendant should be acquitted. I have further thought that as to count 7, the conspiracy count, the jury should be told similarly that such diversion was a necessary purpose of the conspiracy, and that if not established beyond all reasonable doubt, that the defendant should be acquitted of the conspiracy count, the instructions in each instance to set forth that the letter mailed and delivered in Spokane, Washington, was to be to the knowledge of the defendant Allen either directly established or by inference intended for the purpose of carrying out the purposes or aiding in carrying out the purposes of any such scheme or conspiracy.

It is my understanding from informal discussion with counsel that the defendant and his counsel object at this time to my narrowing the issues as to each count, and it is my understanding that since the defense counsel objects, the government counsel

prefers that such instructions as I would prefer to give and which I have informally read to counsel be not given. Is that right, Mr. Stocking?

Mr. Stocking: That's what Mr. Erickson and I expressed, yes.

The Court: Now, Mr. Emigh, for the record I think you [1343] might express your objections.

Mr. Emigh: May it please the court, as to the instructions the court has now read to counsel and advised counsel that the court thought it might be advisable that the same be given to the jury, we make this statement in behalf of the defendant: We believe and the defendant believes that the giving of instructions after the jury has taken a case under deliberation, and unless the jury has indicated confusion in respect to the law, and the need of further instructions from the court, tends to distract the minds of the jurors from their duty as deliberators, and tends to accent the particular matter to which the instructions relate. The present instructions are known as "plaintiff's instructions." They're the instructions usually tendered by plaintiff in a criminal case. They were prepared by the court in this instance, but relate to the same matter. We feel as we did yesterday that there was some defect in the instructions given by the court. We feel these instructions are in some respects in conflict with the instructions given by the court. We feel that a jury of laymen cannot possibly, if these instructions are given, differentiate between those portions of the law to which these instructions apply and modify as

the instructions were given, and those portions of the law which the instructions would not operate to; that the proposed instructions can do nothing but at this point confuse the jury, will not be of aid to the [1344] jury, will minimize the force and effect of instructions requested by defendant and given by the court or given by the court of his own motion, securing to the defendant the right of proper consideration of his case by the court and of a fair trial, and we most respectfully protest to the court the giving of any further instructions unless and until the jury indicates that they are in confusion on some specific matter, and then at that time the matter might have a different aspect, and I want the record to be very clear in one thing: The defendant is sincere in this, and counsel appreciates that yesterday we took exceptions to instructions because we weren't clear in that regard, and we want the court to feel that we're not playing fast and loose with the court and trying to get some kind of an error in the record, because that isn't it, and that's why I'm making an extensive statement; I want the court to see how we feel about the effect of such instructions on the defendant's case.

In other words, as I have stated off the record, we do not believe that minds of the laymen, and I think that also applies to the mind of a lawyer, can grasp a copious set of instructions as has been given by the court as necessary in these cases under the law, and the giving of specific instructions at a later time we believe would cause the jury to overlook the force

and effect of previous instructions given, and we certainly want the record to show that the [1345] defendant feels that his defense will be materially prejudiced if these instructions are given, and for those reasons.

The Court: Well, counsel, do I understand that the defense is—I understand that the defense is still insisting upon each and every exception taken to the refusals by the court of the instructions requested by the defendant?

Mr. Emigh: Yes, we're waiving no exceptions, your honor.

The Court: You're waiving none as to those given by the court either?

Mr. Emigh: Not unless we have expressly waived it in the past; I think we withdrew some when we started, but we may say for the record that any legal exceptions and objections we now have, we're not waiving.

The Court: You're not only insisting on the exceptions you took, but you're insisting that the court not give any instruction that may be a correcting instruction?

Mr. Emigh: Under these circumstances, yes, your honor; I want to be very frank with the court.

The Court: Mr. Reporter, will you read the exceptions taken by counsel to the instructions given? Not those to the refusal of the requested instructions.

(Whereupon, the reporter read the exceptions taken to the instructions as given.)

The Court: Well, I had felt that the instructions I had in mind as to each of the seven counts was to the [1348] interest of the defendant, particularly in view of the defense counsel's argument to the jury. Under the circumstances, since the defendant objects to the respective instructions as to count 1 to 7 which narrow the issue and which clearly and correctly state all the ingredients of the offense, and which have been read to all counsel and the defendant, I will not insist on giving such instructions to the jury at this time, or until the jury may request instructions, if it so does.

(Further discussion off the record.)

The Court: The substantial objections of the defendant to the suggested instructions of the court are that to give the instructions at this time without a request by the jury will do two things; first, confuse the jury, and second, accentuate in the jury's minds these instructions given without the instructions given yesterday, the general instructions which would remain in effect, and in support of such position of the defense the defense reminds the court that the jury took this case sometime between 6 and 7 o'clock last evening, and after dinner continued to deliberate until half past 11 or 12 o'clock last night, and that it again commenced deliberating at a quarter after 8 o'clock this morning, that it is still deliberating, and that the court's suggestion to counsel



was not made until about a quarter after 11, and that it's now approximately ten minutes to 12. It is only fair to counsel on both sides to state that the suggested narrowing [1347] instructions which I contemplated were only read to counsel, and that while counsel on either side notices from such informal reading by the court of such contemplated modifying instructions any error therein, that neither counsel would wish to say same were free from error without an opportunity to reach such. Is the statement that the court has made reasonably correct, Mr. Stocking?

Mr. Stocking: Yes.

The Court: Mr. Emigh?

Mr. Emigh: Defendant accepts it.

The Court: All right. Well, thank you, gentlemen. Court is recessed subject to call in connection with the jury. If the jury requests further instructions I will meet such situation then.

(Whereupon, at 11:55 o'clock A. M. the court took a recess in this cause subject to call.)

Saturday, June 18, 1949, 2:20 o'clock P. M.

(Whereupon, the court convened in the absence of the jury, all counsel and the defendant being present.)

The Court: The court is in session. Word has come to me that the jury has requested another verdict, I take it a duplicate of the verdict which was had.

Bailiff Keenan: Yes, another blank form.

The Court: Is there any reason why another blank form [1348] should not be sent to the jury?

Mr. Emigh: We have no objection, except if it's going to be the same form as the previous verdict, we object to that form as being misleading, but we have no suggestion otherwise.

The Court: I'm going to suggest one thing, Madam Clerk, that is in the title of the case you put the names of all the defendants, and make it "defendants." Is there any desire on the part of either side that I have the jury come in to have the form of verdict delivered to the jury in open court, or is it satisfactory for the bailiff to deliver it?

Mr. Emigh: It's satisfactory to the defendant it be delivered by the marshal or the bailiff in charge of them.

The Court: Yes, all right. I have available for the jury a verdict reading as follows: "District Court of the United States, Eastern District of Washington, Northern Division. United States of America, plaintiff, vs. James Anthony Allen, Francis Clayton Keane, and Joseph Valentine Grismer, defendants, No. C-7975. We, the jury in the above entitled cause find the defendant James Anthony Allen blank guilty as charged in count 1, blank guilty as charged in count 2, blank guilty as charged in count 3, blank guilty as charged in count 4, blank guilty as charged in count 5, blank guilty as charged in count 6, and blank guilty as charged in count 7 of the indictment. Blank, Foreman." It is the court's intention to have this form of verdict delivered to

the jury [1349] pursuant to what the court understands is the jury's request. Now the defendant may make his objections.

Mr. Emigh: The defendant objects, your honor, to the form of the verdict. It is complete in its present form, and it would tend to mislead the jury as to the verdict which they should return, and that the defendant asks that a verdict be submitted in the alternative on each count separately; for example, that "We the jury find the defendant James Allen guilty of count 1 in the indictment." Immediately under that another paragraph "not guilty of count 1" and a like designation as to each of the counts.

The Court: Well, I have in mind the objection of counsel. I'm satisfied that this form of verdict is as fair to the defendant as the other would be, because as counsel suggested the "is guilty" would appear first. The jury has been definitely clearly instructed that they're to vote separately as to the guilt or innocence of the defendant on each count, that their verdicts may be all guilty or all not guilty or part guilt and part not guilty, and that as to each verdict that the jury unanimously votes guilty, that they're to cause the foreman to write in the word "is" in the blank; as to each verdict as to each count concerning which they unanimously agree on a verdict of not guilty, they're to cause the foreman to write in the word "not." I'm satisfied that's clear; it's in accord with many years of practice, and personally I think [1350] it's fairer to the defendant than the verdict that Mr. Emigh suggests.

Mr. Emigh: May we have an exception?

The Court: You may. All right, Madam Clerk, you may furnish this to the deputy United States marshal acting as bailiff for delivery to the jury.

Bailiff Keenan: They'll just retain the other copy too?

The Court: All right. The court will be in recess subject to call in connection with this case and in connection with this jury.

(Whereupon, at 2:30 o'clock P. M. the court took a recess in this cause subject to call.)

Saturday, June 18, 1949, 4:50 o'clock P. M.

(Whereupon, the court convened in the absence of the jury, all counsel and the defendant being present.)

The Court: I'm advised that Mrs. Keenan, the deputy marshal acting as bailiff, has a message. What is it?

Bailiff Keenan: The foreman of the jury wished to inform you that they were at a deadlock.

The Court: All right, gentlemen; you've had the same information I've had. I may say I'm not disposed to discharge the jury this soon, with as long a case and as many exhibits as this has, but I wished counsel and the defendant to have the same information that I might have. It is my expectation [1351] in a reasonable time to have the jury brought in if in the meantime they have not agreed, so you may advise the jury that the court expects them to continue deliberating. Any objection?

Mr. Etter: No objection.

(Whereupon, at 4:52 o'clock P. M. the court took a recess in this cause subject to call.)

Saturday, June 18, 1949, 5:35 o'clock P. M.

(Whereupon, the court convened in the absence of the jury, all counsel and the defendant being present.)

The Court: Madam Clerk, will you get word to the bailiff to have the jury come in?

Mr. Erickson: May it please the court, is it proper to address the court in the absence of the jury?

The Court: Surely.

Mr. Erickson: I was wondering if it would be deemed proper to ask the jury if they had agreed as to any counts?

The Court: Yes, I think that's proper.

Mr. Erickson: And receive a verdict as to those counts to which they have agreed?

Mr. Emigh: We would want to enter an objection to the latter procedure.

The Court: You would?

Mr. Emigh: Yes. [1352]

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Members of the jury, have you agreed upon your verdicts as to all seven counts and each of them?

The Foreman: We have not, your Honor.



The Court: All right, you may be seated. It has come to me as a message from the jury about an hour ago, as I remember it, that the jury felt unable to agree. Is that the message that was sent?

The Foreman: That's correct.

The Court: First, ladies and gentlemen of the jury, if you haven't agreed yet you shouldn't be discouraged. This case took ten days before you started to deliberate. There are many exhibits. There were many witnesses and many matters presented to you, and it's not at all surprising or strange that you haven't yet agreed. I'm going to allow you to continue deliberating. I wish to remind you that there isn't any reason to believe that if I were to discharge you and then to later have another jury come and have a trial of ten days or thereabouts for them, that that jury would be any more able or competent of agreeing than you twelve. You should keep in mind that you're just as able and just as fitted to agree as the next jury would be able after another similar trial of similar length. I'm going to ask you to return, it will soon be time for dinner, but after dinner to continue conferring [1353] calmly with each other, paying respectful attention to each other's views and recollections, with the hope of agreeing unanimously if you conscientiously can do so upon each of the seven counts. As you listen to each other, if any of you after such consideration of the others' views honestly come to the opinion that your earlier view was mistaken, then you should change your view and ac-

cept the new view that you have later come to think was correct, but I'm not suggesting at all that you should surrender any conscientious opinion merely for the sake of agreeing.

It's not intended at all when the jury deliberates that any juror should depart from that juror's conscientious, honest opinion as to the guilt or innocence of the defendant as to any count or counts merely to be agreeable with some other or others, but it is hoped that as the jury continues to consider the exhibits and each other's views, that some of them will find that they have honestly been mistaken, and that the other view is honestly and conscientiously the correct one, but if you ladies and gentlemen ultimately are not able conscientiously to agree on your verdict as to the seven counts, then of course it will be, at the appropriate time as the court deems it, necessary for the court to discharge you and then have the matter presented to some other jury, and I want again to remind you that I haven't any reason to believe that that other jury can be any better at agreeing than you are, because I would want the next jury to be just as conscientious in holding to their respective views until honestly and conscientiously convinced as you are. Finally, if you're not able to agree unanimously and conscientiously as to all seven counts, but are able to agree as to some of the counts, and are convinced that you cannot agree as to the other or others, then you may notify me and I will determine then whether or not your verdict so far as you're able

unanimously to agree shall be accepted and you shall be discharged as to the rest and some later jury presented with the responsibility and problem of deciding as to the balance. However, if you're not able honestly or conscientiously to agree unanimously as to the verdict on any count, it is my instruction to you that you should not then agree on any count. I indicated to you yesterday that I wasn't going to be surprised if it took until today or even tomorrow for you to agree. I knew all the great mass of exhibits that were before you, so I may let you know that I'm not surprised, and I think you shouldn't be discouraged. I know you're tired, and at this time I'm going to let you go back, and I hope regardless of whether or not you've been disappointed on being called in here, that you're able to much enjoy your dinner, so good-bye until I see you again.

(Whereupon, at 5:48 o'clock p.m. the jury again retired to deliberate upon its verdict.)

The Court: All right, counsel.

Mr. Etter: No exceptions.

Mr. Emigh: No exceptions. We consider it a very fair statement.

(Whereupon, at 5:52 o'clock p.m. the Court again convened in the absence of the jury, all counsel and the defendant being present.)

Bailiff Keenan: The foreman said he would like some additional instructions.

The Court: All right, the jury may come back.

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: All right, members of the jury, I understand that in behalf of the jury the foreman has a request to make as to instructions. Is that right, Mr. Foreman?

The Foreman: That's right, sir.

The Court: You don't need to stand; you may sit or stand as it's most comfortable.

The Foreman: Your Honor, I'm sorry that we had to call the court back in, and offer an apology for the whole jury at this time.

The Court: You needn't do that.

The Foreman: There seems to be some question in the jury's mind as to whether count 1 would include all the other counts. That interpretation is—a portion of it, rather, the [1356] first part.

The Court: That's one question. Now, is there any other?

The Foreman: Well, I'd like to have the jury, if there's anyone that has in mind, if they're privileged to speak up at this time. That's the only one that's been suggested.

The Court: That's the only one, as to whether count 1 includes all the other counts?

Juror Schulein: Pardon me, your Honor, may I clarify, if it isn't clear, what some of us would like to know about that count 1? In count 1 is the mail fraud count, as our understanding was, in which that one count is set forth individually as a violation, but the opening charge against the defendant purports of certain violations, and then in the second and third and fourth and fifth and sixth indict-

ment it says in so many words "the grand jury repeats the charges given in count 1." Now, I may be wrong, and then also in the seventh count, for conspiracy, in different expression, from some of our interpretation, gives exactly the same charge. Now, what we can't understand is that with these tie-ups on all the counts, it seems that with the original charge in count 1, that that would carry through in all the other six counts. Now, I don't know if I've expressed myself or made it any clearer.

The Court: I think I have in mind what is troubling the jury or some of the members, but I would prefer, since there's no airplane rush, that I might allow counsel to at least give [1357] me their views before I advise you. If there was an immediate urgent rush that required me to give you the answer now even before you could go to your jury room and back, we'd have a different situation, so I'm going to suggest that you be excused now, and I'll call you back, I hope, a little later. It's all right if the jury goes to dinner, if the dinner is ready. Suppose the jury goes to dinner, and after dinner, when you will be back, at about 7:30, I'll be here. Is that all right?

Jurors 4 and 5: We'd just as soon wait.

The Court: No, you go to your dinner, and then come back. You might be delayed only a few minutes; it might be a little longer. I know enough about dinner on Saturday night, you'd better take them when the arrangements are made.



(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: Now, gentlemen, is there any suggestion by counsel on either side as to what they think I ought to say to the jury in response to this somewhat general question?

Mr. Erickson: I might state this, that I believe that your Honor should instruct the jury that the scheme is set forth in count 1 in detail, and define what that scheme is again in as short, concise language as possible, and then state that the other counts incorporate that same scheme by reference, and that the various respective counts, other [1358] counts, charge that the same scheme was used as count 1, to mail letters on the other dates mentioned in the other respective counts.

The Court: Well, counsel, I'm in somewhat of unison with your views, except I'm not satisfied of my ability to state the nature of the scheme in count 1 in concise language. All right, Mr. Emigh.

Mr. Emigh: May I suggest to the Court that there's only one question the jurors asked, and that was, if the first paragraph of count 1 was incorporated in each of the other counts named, and I think the answer under that is simply that it is, and I think that's all the jury asked and I think that's all the jury should be told. They've been thoroughly instructed on the counts. Further instructions at this time would merely accent some phases of the case which couldn't be properly considered unless a large part of the instructions pre-

viously given by the Court were given in connection therewith, and it would be our belief that the jury be told that the first paragraph of count 1 is by reference repeated in each of the other counts by reference thereto, and substantially so in the conspiracy count, because it refers to the artifice and scheme contained in paragraph 1 of the first count, is incorporated by reference and made a part of each count. I think that's all they want to know, and it would seem that further instructions beyond that would more involve [1359] the case than it would benefit it. Their question has been simple, and it's the belief of the defendant that justice will be served by giving a simple answer.

The Court: All right, Mr. Stocking.

Mr. Stocking: I was going to remind the Court that in the original instructions there was a certain differentiation as to these counts; I think two of them concern mailing of certificates of the Extension Company, and four of the Pilot Company.

The Court: That's correct, and the conspiracy count can involve both or either, but the first six counts necessarily involve one company or the other.

Mr. Etter: By the scheme set out in paragraph 1.

The Court: Paragraph 1 is embrasive enough to make it a combination scheme, but as far as count 1 is concerned, the scheme only affects the Extension Company; the letter was mailed, under the evidence, before the Pilot was formed.

Mr. Stocking: That may be the thought that's bothering them.

The Court: Well, I'm not surprised.

Mr. Emigh: The view of the defendant is that the first paragraph of count 1 is incorporated in each of the counts——

The Court: No question of that, by reference.

Mr. Emigh: ——and that's what the jury asked.

The Court: But only that portion of count 1 is incorporated [1360] in count 2 as refers to the Pilot; only that portion of count 1 is referred to in count 4 as refers to the Extension; only that portion of count 1 that refers to the Pilot is referred to in count 5. The jury will be here at 7:30, and so will counsel. It is still clear that the defendant does not want the all-embracing scheme which can be performed in one of many ways, or in part or all of many ways, reduced to but one way in which it can be a basis for conviction; that is, it's not desired that the jury be instructed that an essential part of the scheme or conspiracy must have been an intention to divert the funds of either the Pilot or Extension or both, and in furtherance of such scheme or conspiracy to use the mails; and I do not expect at 7:30 to eliminate any more from the charges of the indictment which would be a basis for conviction of the defendant than I have, but I've already told the jury that proof of either one of several purposes to defraud would be sufficient for conviction. I'm sorry, gentlemen, that I can't give you a firm excuse until 8:30. You're excused firmly until 7:30. Court is recessed until 7:30.

(Whereupon, at 6:09 p.m. the Court took a recess in this cause until 7:30 o'clock p.m.)

(Whereupon, at 7:30 o'clock p.m. the Court again convened in the absence of the jury, all counsel and the defendant being present.) [1361]

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Members of the jury, I have thought of the question which you presented to me before dinner. The question itself is short, and an apparent short answer would be that the first paragraph of count 1 of the indictment is repeated by reference in each of the other counts and also in the conspiracy count. I'm satisfied that that was not the question that troubled you, because you have the indictment with you, and you can read as well as I that in each of the subsequent counts the grand jury re-alleges as to counts 2, 3, 4, 5 and 6 all of the allegations of the first count of the indictment except those in the last paragraph of the first count, and you can likewise read as well as I can that in count 7, that paragraph 1 of the first count of the indictment is re-alleged.

I assume that there are two problems troubling you. One is whether or not the defendant is not charged seven times with the same offense, and the other is whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count. I may tell you in the first instance that the defendant is not charged seven times with the same offense. Second, it is not necessary that

the government in connection with each of the subsequent counts prove every allegation in [1362] the first paragraph of the first count. As a matter of fact, I told you yesterday that even as respects the first count, the government was not required to prove, although it was privileged to prove, all of the allegations of the first count, but it was not required so to do. For instance, as far as the first count is concerned, it is not necessary, as I told you yesterday, that the government prove that more than one person was connected with the scheme in the first count, although it was proper for the government to prove that there were two or three, and likewise I told you yesterday that as to counts 2, 3, 4, 5 and 6, that it was not necessary that the government prove that more than one person was involved in the alleged scheme, although it was proper to prove that there were two or three, but I did tell you that as to count 7, the conspiracy count, it was essential that the government prove that there were at least two involved, or it could not be a conspiracy, and in substance I advised you that if a scheme involved only one person, it was just a scheme, but that if it involved more than one person, the scheme was still a scheme, but it was also a conspiracy.

I further advised you yesterday that when one or more individuals devised a scheme to defraud, and that such scheme involved the using of the mails, that each time the mail was used was a separate offense, and that there could be as many counts as there were letters or other articles of mail as [1363]



described in the law mailed, although the government was not required to charge as many counts as there were uses of the mail.

Now, as far as the first count is concerned, as I advised you yesterday, although the first count charges a scheme involving both the Extension and the Pilot Companies, as to the first count it's only necessary that the government prove beyond all reasonable doubt that the scheme involved the Extension, although it is all right if the government proved that it involved both, but as to the first count, the defendant cannot be found guilty, even if all the necessary and essential matters alleged are proved beyond all reasonable doubt, including the mailing of the letter, unless he at least was involved in the scheme with respect to the Extension and as to the first count it doesn't make any difference whether he was involved or not involved in any scheme affecting the Pilot.

As to the second count, as I told you yesterday it is essential that the government prove beyond all reasonable doubt in order to gain a conviction as to the second count, that Mr. Allen was involved in a scheme, as I instructed you yesterday, with respect to the Pilot, and as to the second count it doesn't make any difference whether the scheme involved the Extension or not.

Similarly, I told you yesterday that in order to justify [1364] a conviction as to the defendant Allen as to the third count, the scheme had to involve the Pilot Company; as I instructed you yesterday,

it doesn't make any difference whether it involved the Extension or not, as to the third count.

As to the fourth count, the Security fraud count, the letter there charged is charged as having been in connection with the Extension, so it is necessary that the fraud charged, in order to justify a conviction, it is necessary that any fraudulent scheme proved in order to justify a conviction as to the fourth count shall have involved the Extension, and it doesn't make any difference whether the Pilot was connected with such scheme or not; but as to the fifth and sixth counts, as I told you yesterday, the scheme in order to justify conviction of Mr. Allen as to either the fifth or sixth counts necessarily had to involve the Pilot, without it making any difference whether the government proved it did or did not involve both companies; so as to the first and fourth counts, in order to justify a conviction, in addition to the other things that I told you yesterday had to be proved beyond all reasonable doubt, it's necessary that the evidence establish that the scheme was in connection with the Extension Company, regardless of whether or not the Pilot was or was not involved. In order to justify conviction as to the second, third, fifth and sixth counts, or any of them, the evidence must establish beyond all reasonable doubt, in addition to the other matters [1365] I advised you yesterday, that it was the Pilot Company that was involved in the scheme, so that if you should be convinced beyond all reasonable doubt that the defendant was involved in the

scheme to defraud as charged, and that he used the mails or that the mails were used as charged, but you found that the defendant Allen's connection was only established beyond all reasonable doubt with any fraud involving the Extension, you could then only convict him of counts 1 and 4 of the first six counts, and you'd have to acquit him of counts 2, 3, 5 and 6.

On the other hand, if you were to find beyond all reasonable doubt that the defendant Allen participated in the scheme to defraud as charged, and that the mails were used as charged and that he did the things that I stated yesterday were necessary for conviction, but that he did not become connected with any such scheme until sometime during the life of the Pilot, and then only in connection with the Pilot, you would have to acquit him as to counts 1 and 4, because they relate to the Extension, and then you could only convict him as to counts 2, 3, 5 and 6; but as to count 7, the conspiracy count, while the evidence may show, if you so find beyond all reasonable doubt, that the defendant Allen conspired with Grismer and Keane or either of them for the purposes of using the mails to defraud as charged, and/or using the mails for the purpose of defrauding as charged by the sale of securities through the mails—would you read that as to count 7?

(Whereupon, the reporter read the portion beginning with the words "But as to count 7, the conspiracy count, while the evidence may

show” and so forth, through the words “by the sale of securities through the mails.”)

The Court: —and with respect to both the Pilot and Extension Companies, it is not necessary that the evidence establish beyond all reasonable doubt that he participated in any conspiracy as to both companies as charged. It will be enough if the evidence satisfies you beyond all reasonable doubt that he participated in a conspiracy for any period as to either of the two companies or both, and as to either the mail fraud act or the Securities Act, either or both, but as I told you yesterday, in the event you find beyond all reasonable doubt that he participated in a conspiracy with some other person or persons consisting of both Keane and Grismer or either, that it would be necessary to show that after he knowingly and intentionally and willfully participated in any such scheme, that a mailing overt act was performed in Spokane, Washington, at least one overt mailing act as charged in Spokane, Washington, after he had commenced to participate knowingly in the conspiracy, and that such overt mailing charge was related to the particular company concerning which you find beyond all reasonable doubt any conspiracy he participated in was connected with, although I told you that if you [1367] found beyond all reasonable doubt that he participated in the conspiracy charged as to both companies, that then the overt act or acts could be as to either or both companies.

I further told you yesterday and made plain to

you that as to each of the counts, including the seventh count, while it was proper for the government to prove the entire scheme to defraud in the conspiracy alleged, that it was not required that the government prove all of it—what was that last?

(Whereupon, the reporter read from the words “while it was proper” through the words “government prove all of it.”)

The Court: —the government prove all of it, but only that the government was required to prove beyond all reasonable doubt that the purpose of the conspiracy, and likewise the purpose of the scheme, was for the doing of at least one of the several things of the larger number mentioned in the indictment which I yesterday told you of.

If a person individually devises a scheme to defraud by use of the mails and he sends one letter, he can be charged in one count, if that one letter is in connection with and for the purpose of furthering the fraud, whether it succeeds or not. If he sends ten letters for the same single scheme of himself alone, he can be charged in ten different counts, one count for each letter, although the government doesn't have to and probably wouldn't charge him with that many counts. If, however, an individual joins with some other person or [1368] persons in a scheme to use the mails to defraud, and one letter is sent, whether by him or by one of the others, or as a natural consequence of the performance of the intended scheme which that party should know



in all probability would occur, then that individual and the other individuals can be charged in one count with conspiracy, and then they can also be charged in addition to the conspiracy with a separate count for each letter that was mailed, so that if two or more persons form a scheme to defraud, using the mails, and send one letter, there could be two counts against them, one of conspiracy and one that they mailed a particular letter for the purpose of effecting the scheme to defraud. If two or more persons joined in the scheme together to use the mails to defraud, and ten letters were mailed, then the two or more could be charged with a conspiracy in one count, and they also could be charged in ten separate counts, one for each letter that was mailed. That would make a total of eleven, and there's not a duplication of charges, because each mailing is a separate count. The conspiracy is another separate count, and if in addition the scheme to defraud is to not only use the mails, but to use the mails to violate the Securities Act by selling shares of stock in a corporation, then there can be a charge of conspiracy, another charge of using the mails to defraud, and a third charge of using the mails to defraud through the sale of securities. [1369]

I've said this much because I have felt that your question indicated two things, one that you were wondering whether or not the defendant was not charged seven times with the same count, which he's not, and the second, whether or not the government had to prove each and all of the allegations of

each count, or of count 1, because it's referred to in the others, and again, the government does not, but the government does have to prove for conviction of the defendant Allen as to each and every count all of the things beyond all reasonable doubt which I advised you yesterday it was necessary for the government to prove.

I'll let you know now that all of the instructions that I gave you yesterday are in full force and effect, including the presumption of innocence, reasonable doubt, its definition, and all of the other things that I told you yesterday. You may now retire.

(Whereupon, at 8:04 o'clock p.m. the jury again retired to deliberate upon its verdict.)

Mr. Emigh: The defendant James Anthony Allen objects and excepts to the instructions given by the court in answer to a request of the jury for further instructions as to whether or not paragraph 1 of count 1 of the indictment was incorporated in each of the remaining counts, on the grounds and for the reasons that said instructions do not in direct, simple and understandable language to a layman answer the one simple and [1370] direct question asked by the jury; that the instructions given by the Court, while the gist of the answer is contained therein, the answer is so concealed by divers, numerous and extensive other instructions as to elements not inquired of by the jury as to wholly conceal the answer to the question propounded by the jury, and the remaining portions of the instructions, while

correct statements of the law, are not in answer to the question, to the direct question of the jury, but are in answer to a condition of mind which the court assumed the jury entertained, not directly disclosed by their question, and thereby the instructions given by the court tend to distract the minds of the jury from the answer which they sought to have elicited, and serve only to further perplex and to confuse the jury and to re-impress upon their minds the essence of the instructions commonly known and referred to as "plaintiff's instructions", and tend to single out and point out certain matters and things to be proven which the jury it must be assumed understood, or they would have, when asked if there was further confusion, stated to the court.

That further, in an instance or two in the Court's instructions and in dwelling upon the essential elements to be proven in relation to the various counts, the court omitted to state in connection with each count that one or more of the objects of the scheme, and the scheme itself set forth in paragraph 1 of the indictment, must be proven in connection [1371] with each and every overt act committed and in connection with the indictment. That's all.

The Court: The exceptions have been heard. They will be noted. The court must assume that the jury wished more from the court than a statement that the indictment in the other later counts re-alleged the allegations of the first paragraph of count 1, because the jury has the indictment, and it

so states. The court feels the statements made to the jury were in answer to the problems suggested by the question of the foreman particularly, by reason of the further statements of juror number 5. The Court will be at recess.

Mr. Emigh: Pardon me; did you make an express ruling on the exceptions, your Honor?

The Court: Well, I said the exceptions will be noted; the statements I gave to the jury will stand.

Mr. Emigh: Well, I wasn't clear, and I wanted to be sure to have it in the record. Thank you.

The Court: Court will be recessed subject to call in connection with this case and this jury.

(Whereupon, at 8:10 o'clock p.m. the Court took a recess in this cause, subject to call.)

(Whereupon, at 10:30 o'clock p.m. the Court again convened in the absence of the jury, all counsel and the defendant being present.)

The Court: I'm contemplating having word sent to the [1372] jury that they may decide whenever they'd like to go to bed, because it is my idea that at least the jury should be kept together for a reasonable time tomorrow. It must be remembered that there's not much more than twenty-six hours gone by since they returned from dinner last night, and my disposition is to tell the marshal that he may advise the jury that they're free to go to bed at any time they'd like. Any reason I shouldn't so advise the Marshal?

Mr. Emigh: Your Honor, at this time the de-

fendant moves the court for an order discharging and dismissing the jury on the grounds that the jury has sufficiently deliberated upon the verdict, having come before the Court, requested additional instructions, and having been given such instructions and having not reached a verdict within a reasonable time. More than twenty-six hours have elapsed since the case was given to the jury, and a verdict of either kind, guilty or not guilty, reached by the jury after this stage will be one resulting from coercion resulting from requiring a further consideration of the case.

The Court: The Court has heard the motion.

Mr. Emigh: Exception.

The Court: If this were a case of only a short trial and a few exhibits, or perhaps if it were a case of a trial as long as it was with no exhibits or few, there would be more merit in the defense motion. The exhibits in this case [1373] cannot be measured merely by the number that have been admitted. Many of those exhibits consisted of many items which could have been introduced as a separate exhibit, and no real favor will be done to anyone to discharge this jury and then to have another fetched to hear the same trial and to be perplexed by the same mass of exhibits. The motion has been heard; it is denied.

Mr. Emigh: Exception.

The Court: The bailiff may advise the jury that whenever they'd like to go to bed, they may, that



is, when they have decided that the jury as a whole would like to retire, they may do so.

Bailiff Isaacs: You don't want them brought in here?

The Court: I don't know any reason they should come in here, not at the present moment. This may mean that they'll come in here. We'll wait for a little while for any message that may come.

Bailiff Isaacs: I gave the foreman your message, your Honor, and he said they would like to continue, they will let us know when they want to retire.

(Whereupon, the Court took a recess in this cause, subject to call, and at 11:42 o'clock p.m., recessed to convene at 9:30 o'clock a.m. Sunday, June 19, 1949.) [1374]

Sunday, June 19, 1949, 9:35 o'clock a.m.

(The Court convened in the absence of the jury, the defendant and all counsel except Mr. Cullen being present.)

The Court: Court is in session. The jury has just started, and I think the jury should be kept together a reasonable time. Yesterday the defense thought a reasonable time had already expired. I'm assuming that the defense still has the position that the jury is to be discharged, is that right, Mr. Emigh?

Mr. Emigh: That's correct.

The Court: What is the government's position?

Mr. Erickson: The government believes that the jury should be kept together a reasonable time in view of the length of the case, the complicated number of exhibits, and the multitude of evidence, and before they're discharged I think they should be queried as to whether or not they've agreed upon any counts. We have authorities to support the contention that the court can so inquire.

The Court: Let me see the authority.

Mr. Erickson: Well, Mr. Stocking has some there. I have one, U. S. vs. Klanos, 163 F. 2d 593, and 65 F. 2d 285, U. S. vs. Frankel, and the case in 163 F. 2d is particularly significant in that it was decided after the new criminal rules [1375] went into effect, for whatever change the new criminal rules make in the old procedure. Mr. Stocking has a Supreme Court case.

Mr. Stocking: It's an old Supreme Court case that seemed to be one of the leading cases, Sylvester vs. U. S., 170 U. S. 262. U. S. vs. Catter, 60 F. 2d 689, is another case that holds that the verdict as to certain counts can be received before disposing of the whole case.

The Court: Court will be at recess subject to call.

(Whereupon, at 9:37 a.m. the Court took a recess in this cause, subject to call.)

(The Court convened at 10:25 o'clock a.m. in the absence of the jury, the defendant and all counsel except Mr. Erickson being present.)

The Court: The Court understands the jury has

agreed upon its verdict. You may bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Has the jury agreed upon its verdict?

The Foreman: We have, your Honor.

The Court: As to each and all of the seven counts?

The Foreman: Yes, sir.

The Court: You may hand the verdict to the bailiff. The clerk may read the verdict.

(Whereupon the verdict of the jury was read in open court, [1376] and at the request of Mr. Emigh, the jury was polled.)

The Court: The jury have been polled, and each juror has said that the verdict as returned of not guilty as to each of the first six counts, and as to the defendant being guilty as to the seventh count, is the verdict of each juror and of the jury. The verdict of the jury is that the defendant is not guilty on the first six counts, is that correct?

The Foreman: Correct.

The Court: And it is the verdict of the jury that the defendant is guilty on count 7?

The Foreman: Correct, your Honor.

The Court: All right, the verdict will be filed. Is there any reason this jury should not be discharged from further consideration of this cause?

Mr. Emigh: No, your Honor.

(Jury discharged and excused.)

(Discussion between court and counsel regarding bail of defendant pending imposition of sentence.)

Mr. Emigh: May it please the Court, counsel has called to my attention the fact that under the new rules, we should probably, to preserve our record, renew our motion for acquittal at this time. My impression was we had five days, but to be absolutely on the safe side, may the record show that the defendant now renews the motion for judgment of acquittal submitted to the court at the close of the government's case, as to count 7 of the indictment, having been found not guilty [1377] as to the other counts; that is to preserve our record, your Honor, in case it is necessary.

The Court: A motion has been presented. The same is overruled and denied. Exception noted, and I will fix the 16th day of July, 1949, in this courtroom, at 11 o'clock a.m. as the time for hearing any motion for new trial that may be submitted, and for the time for imposition of sentence in the event no motion is presented, or if presented and such is overruled.

(Whereupon, at 11 o'clock a.m. Sunday, June 19, 1949, the Court took a recess in this cause until Saturday, July 16, 1949, for hearing of motions and imposition of sentence.) [1378]

Spokane, Washington, Saturday, July 16, 1949

(Defendant's motion in arrest of judgment, motion for judgment of acquittal as to count 7, and motion for new trial as to count 7 having been presented, argued and denied, the following proceedings were had, defendant and all counsel except Mr. Murray being present.)

The Court: The Court has heard what has been said by Mr. Emigh with respect to Mr. Allen. This matter was presented to me through two weeks of trial. Necessarily I have a much greater acquaintance with him and his life than I would have had if he had pleaded guilty before me today and was before me immediately thereafter for sentence.

Since the return of the verdict I've given serious consideration to what I should do. I may say that it has not been my practice, and I'm sure I have not done it other than in most extraordinary circumstances, to place one on probation for a felony where that one has stood trial, and in this instance I feel that a sentence should be imposed and should be served. The problem before me is what that sentence should be. It is my recollection the maximum which the law permits is imprisonment of two years with a fine, is it \$5,000?

Mr. Erickson: \$10,000.

The Court: A fine of \$10,000. If the law provided and if Mr. Allen's means made payment practicable, I would of [1379] course feel that aside from imprisonment there should be a fine sufficient



to make restitution to all those persons who have lost by reason of the activities of the defendant and his associated. The law provides no such remedy, and if it did, Mr. Allen's finances I'm satisfied would make the imposition of such a fine merely a gesture.

I'm satisfied from what has been seen by me in the courtroom that Mr. Allen is extremely fortunate in his wife and daughters. The tragic thing today is that the innocent wife and daughters will suffer so extremely. Unfortunately, usually the innocent loved ones in practically every case are those who bear the brunt for law violation. They of course will not be able to realize it; I do, however, sympathize with them tremendously. It's been suggested that Mr. Allen has many friends who are still his friends and still have confidence in him. I have no reason to question that, and those friends will neither agree with or understand what I am compelled to do. It is a sad thing when a man with a wife and daughters and friends has to be sentenced in a court of law, but it's even sadder when a man without family or without friends loses even his liberty.

I may say that having heard the evidence, watched the witnesses, examined the exhibits, and considered the explanations, that I'm satisfied that the jury's verdict as to count 7 was correct. I've already said that it was difficult to [1380] comprehend the acquittal on the other counts except as it might have been natural leniency and a feeling of

being influenced by the prosecution's acceptance of a plea from Mr. Grismer as to one count.

As to the transaction itself, it's my belief that Mr. Keane told the truth. Necessarily, I feel that Mr. Allen intentionally did just the opposite. It's hard to say which of the two was the more to blame. True, Mr. Grismer and Mr. Keane and Mrs. Vermillion and I think Mr. Evans have expressed the opinion that Mr. Allen was the dominating figure in the plan. Quite probably they believe that. I'm not certain that Mr. Allen was any more an effective actor than was Mr. Keane. Mr. Grismer, of course, was merely a minor cog in the machine. It never was intended, so far as the evidence shows, that he was to get anything much more than a job. There was never any suggestion that the compensation to him for that job was to be unreasonably generous, and in addition, insofar as anyone received any temporary benefits, those ones were Mr. Keane and Mr. Allen.

It would be my idea that Mr. Keane and Mr. Allen both and each expected that they would make enough from the Lexington, I think it was, to repay the pilferings or diversions, whatever they may be called, from the Extension and the Pilot. I've been called on, however, many times to sentence someone for embezzlement who never intended to permanently deprive the [1381] fund of what belonged to it. Most of those who appropriate funds accessible to them do it with the idea that they will make the abstractions good. The sad fact is that

so frequently they not only do not make such good, but increase the deficit in desperate attempts to correct the original mistake.

In the trial Mr. Allen was a personable witness. I'm satisfied that the jury would have been glad to have found him not guilty on all seven counts if the evidence and their oaths had so permitted. The thing that cannot be justified on either his part or that of Mr. Keane was the total disregard of the sanctity of funds belonging to a lot of people or to other people. Whenever any funds came into any corporation in which either of them seemed to be interested in, either seemed to have that completely mistaken idea that they could take away and return and divert those funds as happened to suit their then temporary wish. There didn't seem to be any thought of consulting the people who actually were the owners of the money, and this court must be extremely careful that it does not seem to approve such a very wrong and such a very dangerous idea on the part of people who happen to be in control of a corporate treasury.

I agree with Mr. Emigh that to a large degree, Mr. Allen has already suffered. I agree with him that his family has and will suffer tremendously. I'm considerably inclined to believe that neither his general creditors or the particular [1382] stockholders in these two companies will gain the slightest material benefit from his incarceration. My responsibility is greater than that. I mustn't do anything that would encourage others to deal callously with trust funds, and at the risk of what hurt

I do to him, his family, his friends, creditors and stockholders, I must require him to serve a sentence.

It's somewhat inconsistent to me that Mr. Allen could have been sentenced to five years if he had been guilty on count 1 of the mailing of one single letter, but can only be sentenced to two years for being involved in a scheme that embraced the mailing of many letters. I'm not Congress. I don't have to harmonize those inconsistencies. Frankly, I think Mr. Allen's sentence should be greater than the maximum I can give him under the law for count 7, but of course I can't impose a greater sentence than two years and \$10,000 fine. I consider the jury's verdict a recommendation for leniency. Such doesn't bind me, but I shouldn't disregard it. The fine itself would undoubtedly be paid by his family and creditors. My feeling is that there would be no greater warning by a combination of fine and imprisonment than there is by imprisonment alone.

Having said that a greater sentence than two years is what Mr. Allen should receive, it might seem that I would have a rocky road in trying to explain giving him something less [1383] than two years. There are many good things than can be said of Mr. Allen in addition to those that have been said by Mr. Emigh. It is proper to give him consideration for such. All in all, I think a sentence of eighteen months is one that the court should impose. This is not yet a ruling. Both sides know what I'm now thinking. The recommendation of the court would be that such be served on McNeil Island. Now that I've made an indication, counsel



on each side may say anything if they wish. Mr. Erickson?

Mr. Erickson: We have nothing to say, your Honor.

Mr. Emigh: We've said what we could, your Honor.

The Court: Before imposing sentence, under all the circumstances I think I can well say that my own opinion is that Mr. Allen and Mr. Keane were about equal in their activities, Mr. Keane more active in one direction, Mr. Allen perhaps in another. Mr. Keane by virtue of his office and his name and his signature having been used, it seems to me was guilty to an absolute certainty whether he pleaded *nolo contendere* or not. Mr. Allen, being conscious of an injunction, put himself in a position where the evidence was not to an absolute certainty, but was beyond all reasonable doubt. Mr. Grismer was substantially a dupe, as I see it. Under all the evidence he was responsible for the law violation he engaged in, but he was a rather inconsequential participant.

Mr. Allen may come forward. It is the judgment of the [1384] court that the defendant James Anthony Allen upon the verdict of the jury is guilty of the conspiracy charge contained in count 7 of the indictment. He's committed to the custody of the United States Attorney General or his authorized representative for imprisonment in such institution as the Attorney General or his authorized representative by law shall designate for a



period of eighteen months. The United States Penitentiary on McNeil Island is recommended as the place of imprisonment. He's remanded to the custody of the United States Marshal for delivery to the head of such institution as the United States Attorney General or his authorized representative may designate in execution of this sentence.

Mr. Emigh: May we have a five day stay of execution in which to prepare a notice of appeal?

The Court: Any objection?

Mr. Erickson: There's no objection, if the court desires that to be done.

The Court: Well, my inclination would be to give you a seven day extension, if you want five.

Mr. Emigh: Well, we would be pleased to have seven, but I didn't want to impose on the Court, and we would ask that he be permitted to go on bond until he surrenders himself to the Marshal on the seventh day, and at this time may the record show that we would ask that he be permitted bond on appeal. That I believe would require another bond if the Court permits [1385] it.

The Court: I think it personally entirely reasonable that he should have a stay until a week from today. There's no reason that the judgment signed today should not so provide. I think there should be a stay until 11 o'clock a.m. on Saturday, the 23rd day of July, 1949.

(Bond on appeal fixed at the sum of \$15,000. Judgment and sentence signed by the Court in the presence of the defendant and his counsel.)

(Whereupon, there being nothing further to come before the Court in this cause, the Court adjourned.) [1386]

### Reporter's Certificate

United States of America,  
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Lloyd L. Black, a Judge of the District Court of the United States for the Eastern District of Washington, held on June 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19 and July 16, 1949, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had therein.

Dated this 7th day of October, 1949.

/s/ STANLEY D. TAYLOR,  
Official Court Reporter.

[Endorsed]: Filed December 21, 1949. [1387]

## CERTIFICATE OF CLERK

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 1431 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Court of Appeals, as called for by Appellant's Designation of Record on Appeal, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitute the record on the appeal from the Judgment of the United States District Court for the Eastern District of Washington to the United States Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that in accordance with the Order of this court entered on the 13th day of August, 1949, I herewith transmit the original exhibits received in evidence at the trial of this cause.

I further certify that the fees of the clerk of this court for preparing and certifying the foregoing record amount to the sum of \$36.80, and that the same has been paid in full by R. Max Etter, of Attorneys for the Appellant.

In witness whereof, I have hereunto set my hand

and affixed the seal of said District Court at Spokane, in said District, this 17th day of December, A.D. 1949.

[Seal]      /s/ A. A. LaFRAMBOISE,  
Clerk of said District Court.

---

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMEN-  
TAL TRANSCRIPT OF RECORD,  
PURSUANT TO APPELLANT'S SUPPLE-  
MENTAL DESIGNATION OF RECORD ON  
APPEAL

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered 1 to 3, inc.\* to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as called for by Appellant's Supplemental Designation of Record on Appeal, now on file and of

\*[Certificate for following documents only.]

Order of the District Court filed Sept. 16, 1948—vol. I page 24 of this printed record.

Bill of Particulars filed Sept. 24, 1948—vol. I page 25 of this printed record.

Supplemental Designation of Record on Appeal filed Dec. 12, 1949—vol. I page 129 of this printed record.

record in the office of the Clerk of said District Court, and that the same constitute a part of the record on appeal from the Judgment of the United States District Court for the Eastern District of Washington to the United States Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that the fees of the clerk of this court for preparing and certifying the foregoing record amount to the sum of \$1.30, and that the same has been paid in full by Therrett Towles, of counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 17th day of December, A.D. 1949.

[Seal]      /s/ A. A. LaFRAMBOISE,  
Clerk of said District Court.

---

[Endorsed]: No. 12437. United States Court of Appeals for the Ninth Circuit. James Anthony Allen, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed December 21, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Court of Appeals  
For the Ninth Circuit  
No. 12437

UNITED STATES OF AMERICA,  
Appellee,  
vs.  
JAMES ANTHONY ALLEN,  
Appellant,  
and  
FRANCIS CLAYTON KEANE, and  
JOSEPH VALENTINE GRISMER,  
Defendants.

ORDER

Good cause appearing therefor, now on motion of the attorneys for appellant James Anthony Allen in the above entitled action,

It Is Ordered that the original exhibits in said action need not be printed and included in the printed Transcript of the Record on appeal therein, but may be considered by the court in their original form.

Done at San Francisco, California, this twelfth day of November, 1949.

/s/ WILLIAM DENMAN,  
Chief Judge, U. S. Court of Appeals for the Ninth Circuit.

/s/ WILLIAM HEALY,

/s/ H. T. BONE,

Judges U. S. Court of Appeals  
for the Ninth Circuit.

[Endorsed]: Filed, December 14, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now appellant James Anthony Allen in the above entitled cause and files the following Statement of Points on which said appellant intends to rely upon his prosecution of the appeal in the above entitled cause, and says that in the foregoing proceedings, and in said judgment, there is manifest error, in this, to wit:

Point No. 1

The court erred in denying the motion of defendant Allen to dismiss Count VII of the indictment on the ground that the indictment is bad for duplicity in that it charges in a single count a conspiracy to commit more than one offense, to wit, the offenses denounced by Sec. 338, Title 18 USCA; Sec. 77 (q) of Title 15, USCA, and Sec. 77 (e) of Title 15, USCA; on the further ground that the setting up of more than one offense in a single count does not enable the court nor the jury to deal intelligently with the charge, and seriously handicaps the defendant in making his defense and prevents him from properly, fairly, or legally defending; that the said count does not apprise this defendant of the nature of the charge against him, particularly because the charge of crime collectively included in said Count VII and being 77 (e) of Title 15, USCA, is indistinct and ambiguous for the reason that no substantive charge of the violation of said statute is

set out anywhere in the indictment and it is impossible in any fashion whatsoever to determine any connection with the various crimes alleged in said Count VII and the overt acts set out therein; and on the further ground that said Count VII of the indictment does not state facts sufficient to constitute a crime against the United States.

### Point No. 2

The court erred in denying the oral motion of defendant Allen, by adoption of defendant Keane's motion, for an order directing plaintiff to file a bill of particulars setting forth as to the first paragraph of Count VII of the indictment what pretenses, representations and promises were made by defendants and who made them, and to whom they were made, and when they were made, and whether they were oral or in writing, and wherein the same were false and fraudulent, when and where the defendants devised and intended to devise the device, scheme and artifice, the names and addresses of the "investors" whom plaintiff intends to use as witnesses in the trial of this action, how much stock of Extension and Pilot was issued to Elmer E. Johnston of Spokane, Washington, and James E. Gyde, of Wallace, Idaho, and how much of said stock or proceeds from its sale was turned back to defendants, and what amounts to each of them, the amount of funds of Extension and of Pilot which had been appropriated and diverted to defendants' own use and benefit, and how much thereof to each of said defendants, when

and where each defendant became a party to said conspiracy, and the names and addresses of the persons to whom securities of Extension and of Pilot were sold and delivered by defendants and amounts thereof; as to paragraph 9 of Count VII of the indictment, the amount of stock therein described received by each defendant; as to paragraph 10 of Count VII of the indictment, the amount of stock therein described received by each defendant; as to paragraph 11 of Count VII of the indictment, when defendants directed Irene Vermillion to draw and sign checks, and which defendants directed her so to do, the number of said checks, and the amount of each, and to whom each is payable; as to paragraph 12 of Count VII of the indictment, when defendants directed Irene Vermillion to draw and sign checks and which defendants directed her so to do, the number of said checks, and the amount of each, and to whom each is payable, and as to paragraph 13 of Count VII of said indictment, the amount of Extension stock sold by defendant Allen, and when said sales were made; all on the ground that the above matters are not averred with sufficient definiteness or particularity to enable defendant Allen to be apprised of the nature of the charges made against him or properly to prepare for trial.

Point No. 3

The court erred in overruling objection of defendant to the question asked the witness Irene Vermillion as follows: "Q. And at whose direction were you acting when you received those checks and en-

dorsed them?''', on the ground that the question called for a conclusion of the witness, the proper foundation had not been laid, and if the directions were not given in the presence of defendant Allen, it would constitute hearsay; that no conspiracy has been established, and the directions of another alleged co-conspirator would not be now admissible, and in permitting the witness to testify as follows: "A. Mr. Keane and Mr. Allen."

#### Point No. 4

The court erred in overruling objection of defendant to the testimony of the witness Irene Vermillion in identifying Plaintiff's Exhibits Nos. 1 to 6 inclusive (checks of brokers deposited in bank account of Extension Company, deposit slips and check stubs of Extension Company, and checks drawn on Extension Company account), and all similar documents and exhibits identified in the same manner or offered in evidence, on the ground that they are incompetent, irrelevant, and immaterial, no proper foundation has been laid in this respect, the exhibits do not appear to be in the handwriting of defendant, nor to have thereon endorsed the signature of defendant; that the state of the record is such that the responsibility of the defendant or the connection of the defendant with these exhibits has not been shown; that, as to the defendant in the present state of the record, all these exhibits are hearsay; that the evidence is insufficient to establish a conspiracy and to make these exhibits competent on the theory of an act of co-conspirator, and that



the exhibits leave the jury to surmise and to speculate in respect to their competency and effect.

#### Point No. 5

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibits Nos. 6a and 6b (checks of Extension Company, No. 8, \$10,000, 8/7/45, to Delaware Mines; No. 9, \$5,000, 8/28/45, to Montana Leasing Co.) on the grounds stated in Point No. 4.

#### Point No. 6

The court erred in overruling objection of defendant to the question asked the witness Irene Vermillion, "Q. Did he (Allen) ever have any other conversation with you about these checks, about his purpose in taking these checks?" (referring to Plaintiff's Exhibits Nos. 6a and 6b) on the ground that the question is leading and suggestive, and in permitting the witness to testify as follows: "Mr. Allen asked me for the checks and I asked him what I should put on the stub, and he told me he would give me the information later."

#### Point No. 7

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 18 (check of defendant J. A. Allen, trustee, to Pilot Co. of 11/20/46 for \$7,000) on the ground that the exhibit is incompetent, irrelevant, and immaterial, and does not prove, or tend to prove, any of the issues of this case, and that the exhibit is as consistent with a legitimate transaction as any other.

## Point No. 8

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibits Nos. 15a and 15b (checks of Pilot Co. deposited to War Eagle bank account, 6/28/46 for \$200 and 7/31/46 for \$1000) on the ground that said exhibits are incompetent, irrelevant, and immaterial, no proper foundation has been laid for introduction of said exhibits at this time, and that the same do not tend to prove or disprove any issue under the indictment in this case.

## Point No. 9

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 46 (two checks of Callahan Consolidated, Aug. 6, 1945 for \$900, and August 28, 1945 for \$150) presented to court for admission on grounds of comparison, for the reason that no proper foundation has been laid for admission of such exhibit under evidence thus far adduced or under any allegation made in any count in indictment with reference to defendant Allen, exhibit is incompetent, irrelevant and immaterial to prove any allegation under any of counts laid in indictment with reference to defendant Allen, and will lead jury at present time in state of record to conjecture and speculate as to effect of exhibit and that a comparison at this time is incompetent, irrelevant and immaterial under issues made in this case and the purpose sought to be made by admission of this exhibit.

## Point No. 10

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 47 (stock certificates issued to Beatrice McLean in Extension Co.) on ground that exhibit is incompetent, irrelevant and immaterial because, so far as evidence thus far adduced, no connection has been shown of defendant in particular sale, if there was a sale, of this stock with any count or allegation in indictment at this time, no foundation laid to connect exhibit itself with any unlawful act of defendant as alleged and charged under any count of indictment at present time.

## Point No. 11

The court erred in overruling objection of defendant to question asked the witness Evans: "Q. Who was dominating the Lucky Friday Extension Mining Company's affairs at the time you were acting as secretary thereof?" on the ground it invades the prerogative both of the jury and the court, and calls for a conclusion of the witness as to who was dominating, and permitting the witness to testify as follows: "Well, I would say that both Mr. Keane and Mr. Allen."

## Point No. 12

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibits Nos. 51 and 52 (transmittal letters of Extension stock to Gibson and Lavigne Companies) on ground that no proper foundation has been laid; they are incompe-

tent, irrelevant and immaterial as it affects any charge laid in indictment in relation to defendant Allen; no connection shown to said defendant and he is not privy to anything that appears here.

### Point No. 13

The court erred in admitting in evidence, during the testimony of witness Nolting and after defendant Grismer had testified, over objection of defendant, Plaintiff's Exhibit No. 72 (Gibson's ledger sheet, account of B. A. McLean) and Plaintiff's Exhibit No. 48 (six checks E. J. Gibson and Co. to cash and B. A. McLean, 1/20/47 to 9/26/47), on ground that as to Exhibit 72 no proper foundation has been laid, not connected up in any way to prove any allegation of any count in indictment against defendant Allen, nor does it show any privity of transaction of said defendant as related to any count in indictment and it is incompetent, irrelevant and immaterial at this time, and that as to Exhibit No. 48 on the face of the exhibit each and every check so designated, beginning with January 20, 1947, and going through September 26, 1947, is incompetent, irrelevant and immaterial to prove any issue made in this case as to the joint concert alleged in counts I to VII of indictment, including those on mail fraud, security fraud and conspiracy, and on the ground that the evidence has already disclosed, and there is no contradiction, that there could not have been any joint concert of action between defendants after witness Grismer and defendant Allen had thrown out or demanded and secured the resignation of Keane who is charged

as an actual accomplice in all the general counts of indictment running up to present time, and that these exhibits on no theory can prove any count set forth in indictment beginning January 20, 1947; that there is no allegation there was any concert of action between Allen and Grismer and as to Grismer six counts alleging such concert of action have been dismissed; that the indictment as to every count alleges prior to June 1, 1945, and continuing to date of indictment naming each and every one of defendants as being co-conspirators with no allegation at all made that there was ever any conspiracy, so-called, existing between two separate defendants beginning at any particular time, but that it was a continuing conspiracy between all three, and on the further ground that there is no connection of these checks on their face or in any other way or of the testimony developed so far with defendant Allen; and on the additional ground (when Exhibit No. 48 was reoffered and admitted upon witness Keane's redirect examination) that on the face of each and every one of these separate items that appear in the exhibits are dates starting with the end of January, 1947, and extending as far as September 26, 1947, and on the testimony of the witness Keane himself that he considered there was no agreement or otherwise, assuming that there ever was, which this defendant denies, between him and Allen after the fall or early fall of 1946, and based further upon the testimony adduced with respect to said witness Keane and defendant Grismer that no conspiracy then could exist so far as



defendant Grismer was concerned and that it is within the exempted transaction, having been made over a year after the original offering, and not claimed that it is treasury stock.

#### Point No. 14

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 70 (Gibson ledger sheet, account Helen Allen), Plaintiff's Exhibit No. 73 (Gibson's checks to J. A. Allen or Helen Allen, 7/2/46 to 12/30/46), and Plaintiff's Exhibit No. 74 (Summary of sales of Extension stock, Helen Allen account to E. J. Gibson & Co.) on the same grounds stated in Point No. 13.

#### Point No. 15

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 71 (Gibson ledger sheet, account Helen Jurgenson) and Plaintiff's Exhibit No. 75 (Gibson's checks to Helen Jurgenson, 11/19/45 to 8/1/46 on the same grounds stated in Point No. 13.

#### Point No. 16

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 1 (checks from E. J. Gibson & Co. deposited in bank account of Extension Co., 8/6/45 to 1/22/46) on the ground that said exhibit is incompetent, irrelevant, and immaterial at this time to prove any allegation set forth in any count of indictment as against defendant Allen, and no proper foundation has been laid.

## Point No. 17

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 13 (check from E. J. Gibson & Co. to Pilot Co. May 20, 1946 for \$40,000) on ground that there is no connection shown as between this exhibit and anything material or relevant as it relates to counts of indictment concerning defendant Allen.

## Point No. 18

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 31 (check of E. J. Gibson & Co. to James E. Gyde, May 21, 1946) and Plaintiff's Exhibit No. 31a (check E. J. Gibson & Co. to James E. Gyde, May 23, 1946) on the ground that no connection shown as between this exhibit and anything material or relevant as it relates to counts of indictment concerning defendant Allen; that the testimony of the witness Gyde did not connect up in any way these two exhibits with defendant Allen, but he specifically stated that what transaction he had was with Keane, that the statements were made by Keane, that the checks or money or whatever was concerned was handled by Keane, and that at this time there is no proper foundation laid to prove any count of the charges laid in the indictment against defendant Allen and the exhibits are incompetent, irrelevant, and immaterial.

## Point No. 19

The court erred in admitting in evidence, over

objection of defendant, Plaintiff's Exhibit No. 77 (register sheets, Samuels Hotel for August 1945) on ground that same is not properly identified and is incompetent, irrelevant and immaterial to prove or tend to prove by impeachment or otherwise any issue in this case.

#### Point No. 20

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 78 (reference book of Samuels Hotel) on the same ground stated in Point No. 19.

#### Point No. 21

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 2 (checks of Lavigne & Co. deposited in bank account of Extension Co. 8/4/45 to 2/13/46) and Plaintiff's Exhibit No. 12 (checks of Lavigne & Co. deposited in bank account of Pilot Co., 5/23/46 to 6/27/46) on ground they are incompetent, irrelevant and immaterial, not proving or tending to prove any issue in this case as made out in any count of indictment as against defendant Allen, no proper foundation laid for their introduction, no connection shown at all between them and anything alleged in indictment as to defendant Allen.

#### Point No. 22

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 21 (letters to Lavigne & Co. transmitting stock cer-

tificates in Pilot Co.) on same grounds stated in Point No. 21.

Point No. 23

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 11 (two checks, 6/5/46 and 6/11/46, from Ben Redfield deposited in account of Pilot Co.) on same grounds stated in Point No. 21.

Point No. 24

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 20 (letter to Ben Redfield transmitting stock certificates in Pilot Co.) on same grounds stated in Point No. 21.

Point No. 25

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 3 (checks of Pennaluna & Co. deposited in bank account of Extension, 7/19/45 to 2/21/46) and Plaintiff's Exhibit No. 10 (checks of Pennaluna & Co. deposited in bank account of Pilot, 5/23/46 to 7/22/46) on ground they are incompetent, irrelevant, and immaterial, do not serve in any way to connect defendant Allen with any allegation or charge laid in any count of indictment, no proper foundation laid at this time, and no showing of any privity to defendant Allen thus far testified.

Point No. 26

The court erred in admitting in evidence, over

objection of defendant, Plaintiff's Exhibit No. 83 (copy of annual statement of Extension Co. filed with Director of Licenses, State of Washington), Plaintiff's Exhibit No. 83a (letter of Elmer Johnston to Extension Co., April 29, 1946, re filing statement), and Plaintiff's Exhibit No. 87 (letter of Johnston to Extension Co., January 11, 1946) on ground no proper foundation yet laid to connect these exhibits in any way with defendant Allen; they are incompetent, irrelevant, and immaterial; the letter, so far as defendant Allen is concerned, is hearsay, and mere fact that "CC" appears upon one is no proof, and there has been none, of any receipt of letter, or copy thereof, by defendant Allen to in any way charge him at this time.

### Point No. 27

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 30 (two checks to Gyde signed by Keane May 22, 1946, and May 27, 1946); Plaintiff's Exhibit No. 33 (check to Cincinnati Co. from Keane May 1, 1946); Plaintiff's Exhibit No. 36 (deposit slip May 22, 1946, F. C. Keane); Plaintiff's Exhibit No. 37 (deposit slip May 22, 1946, Pilot Co.); Plaintiff's Exhibit No. 38 (deposit slip May 22, 1946, Coeur d'Alene Consolidated) and Plaintiff's Exhibit No. 39 (escrow agreement between Coeur d'Alene Mines and Coeur d'Alene Consolidated May 23, 1946, and cashier's check of same date to Coeur d'Alene Mines) on ground that each exhibit is incompetent, irrelevant,



and immaterial, no proper foundation yet laid from testimony of this or any witness within the counts of the indictment as alleged as against defendant Allen.

Point No. 28

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 4 (deposit slips for credit to Extension account); Plaintiff's Exhibit No. 5 (check stubs of Extension Co.); Plaintiff's Exhibit No. 6 (checks drawn by Extension Co., 6/23/45 to 3/13/47), and Plaintiff's Exhibit No. 7 (bank statements Extension Co., July 1945 to March 1947, incl.) on ground that proper foundation not laid, incompetent, irrelevant and immaterial to show any proof of allegations of counts of indictment as against defendant Allen; there is no showing that he was privy to any of the records indicated or had access thereto.

Point No. 29

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 5a (check stubs for checks Nos. 8 and 9 of Extension Co.) on ground that it is incompetent, immaterial and irrelevant to prove any issue as laid in any count of indictment as relating to defendant Allen, no proper foundation has yet been laid, including all of the testimony and the testimony of this witness; the indication of the exhibit and the testimony does not show the defendant Allen privy with anything sought to be proved here, likewise it appears from

the exhibit that the handwriting of penciled notation as to No. 8 as it appears on the exhibit there, \$10,000, on No. 9, \$5,000, is obviously different as to both the \$10,000 and the initials "J. A. A.", yet the testimony has been to the effect that both were executed simultaneously or within a reasonable time after the occurrence of the event, whatever it was, and that the same, so far as defendant Allen is concerned, is mere hearsay and inadmissible to prove any point.

### Point No. 30

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 9a (bank deposit slips, account Montana Leasing and Lexington, June 4, 1945, to December 23, 1946) on ground that the exhibit is incompetent, irrelevant, and immaterial, a proper foundation has not been laid, there is nothing in the exhibit that goes to prove any count or charge as alleged and laid in the indictment against defendant Allen.

### Point No. 31

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 14 (bank deposit slips account Pilot Co. May 22, 1946, to Feb. 26, 1947), Plaintiff's Exhibit No. 15 (checks on account of Pilot Co. from May 31, 1946 to Feb. 18, 1947), Plaintiff's Exhibit No. 16 (check stubs account Pilot Co. from June 3, 1946, to Feb. 18, 1947) and Plaintiff's Exhibit No. 17 (bank statements account Pilot Co., May 1946 to Feb. 1947) on

ground that each and every one of these exhibits are incompetent, irrelevant and immaterial, do not go to prove any issues made out in any account of the indictment as against defendant Allen, and no proper foundation has been laid at this time.

### Point No. 32

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 8-c-1 (check for \$59.99 Montana Leasing to Kent and Rusch, 8/7/45) and Plaintiff's Exhibit No. 8-c-2 (check \$200 Montana Leasing to Inland Empire Racing Association 8/7/45) on ground they are incompetent, irrelevant and immaterial, do not go to prove any issue in this case, no proper foundation laid and same serve no useful purpose other than an accumulation of documents which serve only to confuse jury and to avoid the issues made in each count in the indictment against defendant Allen.

### Point No. 33

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 34 (deposit slip Delaware Mines Aug. 7, 1945), Plaintiff's Exhibit No. 35 (deposit slip Montana Leasing same date), Plaintiff's Exhibits Nos. 41, 41a, and 41b (checks Delaware Mines to Montana Leasing, \$3,000; to Callahan Consolidated, \$6,000; to W. H. Hanson, \$1,000, same date), and Plaintiff's Exhibit No. 45 (check to Delaware Mines from Callahan Consolidated June 16, 1945, for \$6,000 and voucher) on ground they are incompetent, irrelevant, and im-

material to prove any issue in this case as laid in the indictment against defendant Allen; no proper foundation laid, and introduction of these exhibits would serve no purpose other than confusion and speculation as to intent and meaning of exhibits; there have been no connections with counts of indictment shown against defendant Allen.

Point No. 34

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 40 (bank ledger of Delaware Mines with respect to entries since June 1, 1945) on ground it is incompetent, irrelevant and immaterial, it does not go to prove any count or allegation as laid in the indictment against defendant Allen and is in no way relevant to this case.

Point No. 35

The court erred in sustaining an objection of plaintiff's counsel to the question asked the witness, defendant Keane, by defendant's counsel: "Q. Do you know what the purpose of the embellishment was at that time?" referring to statements made by defendant Keane's counsel to secure from the court the acceptance of his plea of nolo contendere to the indictment to the effect that from the early part of 1940 and continuing into 1947 Keane was not attending to his practice of law, that he was using liquor excessively and at various times was not able to intelligently and in some instances to at all discuss any matter with any degree of continuity or

reason, after Keane had admitted that his counsel's statements may have been embellished somewhat, and in refusing to permit the said Keane to answer the question.

### Point No. 36

The court erred in admitting in evidence, over objection of defendant, for purpose of showing that as early as 1944 witness Keane was contending there was a partnership between him and Allen, Plaintiff's Exhibit No. 93 (partnership tax return of Keane and Allen for 1943) on ground that no proper foundation had been laid, it was incompetent, irrelevant and immaterial to prove any issue as made against defendant Allen, and does not support nor prove any testimony so far adduced by Keane to effect that defendants Keane and Allen were operating a partnership under the name of Montana Leasing Company, and so far as foundation has been laid by Keane, it is pure hearsay so far as defendant Allen is concerned.

### Point No. 37

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 44 (Callahan Consolidated deposit slip of August 7, 1945) on ground no proper foundation laid to connect defendant Allen with this exhibit by the testimony of either witness Keane or witness McLean; the same will lead the jury to conjecture and speculation; pure hearsay as to defendant Allen and it is incompetent, irrelevant and immaterial.



## Point No. 38

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 19 (letters to E. J. Gibson & Co. transmitting stock certificates of Pilot Co. on ground the exhibit is incompetent, irrelevant and immaterial, no proper foundation laid, the responsibility of defendant Allen and his connection with this exhibit has not been shown; as to defendant Allen the exhibit is hearsay; no conspiracy established and exhibit leaves to jury to surmise and speculate in respect to its competency and effect.

## Point No. 39

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 86 (letter of Johnston to Keane May 8, 1946) and Plaintiff's Exhibit No. 88 (letter of Johnston to Keane March 11, 1946) on ground that no proper foundation has yet been laid to connect them in any way with defendant Allen and they are incompetent, irrelevant and immaterial; that the letters so far as defendant Allen is concerned are pure hearsay and no proof that the letters, or copy thereof, were received by defendant Allen so as to in any way charge him at this time.

## Point No. 40

The court erred in admitting in evidence, for better understanding by jury of testimony of witness Halin, over objection of defendant, Plaintiff's Ex-

hibit 96 (letter 6/9/49 Preston & Raef to J. T. Halin re disposal of his stock in 1945 in Extension Co.) on ground that same is immaterial, incompetent and irrelevant.

Point No. 41

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 98 (five checks to Allen from Standard Securities Co. 7/25/47 to 1/15/48), Plaintiff's Exhibit No. 99 (account of J. A. Allen with Standard Securities Co.), Plaintiff's Exhibit No. 97 (In-and-Out ledger of Standard Securities Co. on Extension Co.) and Plaintiff's Exhibit No. 100 (In-and-Out ledger of Standard Securities Co. on Pilot Co.) on ground that all of said exhibits are incompetent, irrelevant and immaterial as they refer to defendant Allen and do not go to prove any issue in this case; that they indicate that any transaction had was at the end of July, 1947, and have no connection with any issue in this case, and not binding on defendant Allen as to any issue.

Point No. 42

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 101 (five personal checks from Sandberg to Allen, 8/11/47 to 10/9/47) on ground that said exhibit is incompetent, irrelevant and immaterial to prove any issue in indictment as laid against defendant Allen, no proper foundation or connection shown as to these transactions with any count laid in indictment as charged against defendant Allen.

## Point No. 43

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 50a (stock certificates in Extension Co. endorsed by Johnston) on ground it is incompetent, irrelevant and immaterial, evidence indicates no proper foundation or identity to prove any issue laid in indictment as against defendant Allen.

## Point No. 44

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 104 (confirmation of sales by Hogle & Co. at Butte, Montana, of Extension Co. stock, account of J. A. Allen) and Plaintiff's Exhibit No. 105 (check of \$6,872.95 of Hogle & Co. mailed to J. A. Allen Dec. 3, 1945) on ground the exhibits are incompetent, irrelevant, and immaterial to prove any issue in this case; it is not joined up, and no proper foundation has been laid; and the signature on the check was afterwards proved by appellant's testimony to have been forged by Keane.

## Point No. 45

The court erred in overruling the objection of defendant's counsel to the question asked the witness Denney by plaintiff's counsel: "Q. Now, at how many times during the period covered by Plaintiff's 119 for identification did you discover that deposits were made at the times there were overdrafts in the bank?" on the ground that it calls for the conclusion of the witness and for the further reason that the

government proved by the witness Keane that where the overdrafts appeared on the record, in truth and in fact they were not overdrafts on account of arrangements made with the bank, that they were just merely in the nature of loans, and in permitting the witness to answer: "A. There were twenty deposits made out of Lucky Friday Extension funds and Pilot funds when there were overdrafts in the Montana Leasing bank account."

Point No. 46

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 120 (schedule of checks signed by J. A. Allen on Montana Leasing Co.), on ground that same is incompetent, irrelevant and immaterial for any purpose in this case as it does not prove or tend to prove a diversion of funds from either of the companies and it is immaterial what disposition occurred to those funds after the same were diverted, objections to the sources from which schedule was prepared being reserved.

Point No. 47

The court erred in overruling and denying the motion of defendant, made at the close of plaintiff's case and after counsel for plaintiff announced that plaintiff rested, to strike from the evidence in this cause all exhibits identified and admitted in evidence or identified or admitted in evidence pertaining to and relating to any transactions which said exhibits tend to prove and establish transpiring and occurring or alleged to have transpired or occurred subse-

quent to December 26, 1946, as well as all testimony relating to matters and things alleged to have transpired or occurred or which said testimony tends to prove transpired or occurred subsequent to December 26, 1946, and heretofore objected to by counsel for defendant on the following grounds, to wit:

First, that the evidence affirmatively shows and discloses that subsequent to said December 26, 1946, as appears from plaintiff's evidence, and particularly from evidence of government's witness Francis Clayton Keane, no conspiracy existed or could have existed between this defendant and said defendant Francis Clayton Keane, or between this defendant and the defendant Joseph Valentine Grismer, or between any two or more of said three defendants, and that the evidence in behalf of plaintiff affirmatively discloses and shows that said defendant Joseph Valentine Grismer was at no time a party to or a participant in the alleged conspiracy set forth in the indictment; that said evidence is incompetent for any purpose in the absence of affirmative proof on the part of plaintiff that at any time subsequent to December 26, 1946, the conspiracy alleged in the indictment was still in existence and it appearing from the evidence that defendant James Anthony Allen and defendant Francis Clayton Keane at no times subsequent to December 26, 1946, were on friendly relations or did conspire or scheme together to do any act unlawful or otherwise, and

Secondly, because it affirmatively appears from



testimony adduced from witnesses who have been called and testified on behalf of the government that said Joseph Valentine Grismer could not be and was not a party to any conspiracy whatsoever at the time of the inception of any conspiracy as alleged in the indictment against this defendant Allan and said Francis Clayton Keane and Joseph Valentine Grismer, and therefore could not conspire with or be a party to the conspiracy as alleged in said indictment with said defendant Allen after Dec. 26, 1946.

Point No. 48

The court erred in overruling and denying the motion of defendant, made at the close of evidence and testimony on behalf of plaintiff and after counsel for plaintiff announced that plaintiff had rested and had completed its case in chief, to have the court order the entry of a judgment of acquittal of all offenses of any kind or nature as charged, alleged and laid in each and every one of the counts in said indictment against said defendant (omitting herefrom all counts on which defendant Allen was acquitted) on the ground that plaintiff has wholly and completely failed to prove and establish beyond a reasonable doubt all the material facts and allegations alleged in Count 7 of the indictment to support any charge of crime alleged therein, and that as to Count 7 of the indictment, the testimony of the accomplice, defendant Francis Clayton Keane, fails to establish any conspiracy as charged in the indictment, if credible, and in any event that the character of said witness is such under the evidence

that his testimony is wholly insufficient and incredible to establish a conspiracy as alleged in count 7 or to connect this defendant therewith.

Point No. 49

The court erred in admitting in evidence, on cross-examination of witness Lakes, over objection of defendant, Plaintiff's Exhibit No. 8-m-1 (check to Lakes June 7, 1946, for \$400 signed Lexington Company by Allen) on ground that it is incompetent, irrelevant, and immaterial to prove anything, so far as said witness is concerned, of any association with defendant Allen as brought out on direct examination and improper cross-examination as not being gone into on direct examination.

Point No. 50

The court erred in admitting in evidence, on cross-examination of witness Lakes, over objection of defendant, Plaintiff's Exhibit 8-g-1 (check to Lakes Dec. 21, 1946 for \$1,000 of Montana Leasing Co. by Allen) on ground that it is wholly outside the scope of the direct examination and not material or competent in any sense to prove any issue made in this case, a private sale of stock.

Point No. 51

The court erred in admitting in evidence, on cross-examination of witness Lakes, over objection of defendant, Plaintiff's Exhibit 8-a-1 (check to Lakes June 18, 1945, for \$300 of Montana Leasing Co. by Allen) on ground that it is wholly outside

the scope of the direct examination and not material or competent in any sense to prove any issue made in this case.

Point No. 52

The court erred in admitting in evidence, on cross-examination of witness Lakes, over objection of defendant, Plaintiff's Exhibit No. 122 (three checks to Lakes from Montana Leasing Co. and Lexington Co. November and September, 1946) on ground it is incompetent, irrelevant and immaterial to prove any issue in this case and improper cross-examination.

Point No. 53

The court erred in advising the jury during the examination of the defendant's witness Emacio, that in the event the evidence, when it is all considered, convinces the jury beyond all reasonable doubt that Mr. Allen was guilty of one or more of the counts charged against him, then it will be the duty of the jury to convict Mr. Allen as to such count or counts, regardless of whether or not Mr. Allen may or may not at the same time as having been engaged in the offenses charged was in a central development program, and if the jury is convinced beyond all reasonable doubt from the evidence that Mr. Allen was guilty of one or more of the counts charged, then it will be the duty of the jury to convict Mr. Allen of such, even though the evidence may establish that the Big Friday was as much or more interested in the Extension

than Mr. Allen, and even though it may be established that the Big Friday gained a great deal more benefit than any benefit Mr. Allen obtained. However, you may listen to this testimony about the Big Friday for such assistance, if any, as it may give you in determining whether or not Mr. Allen is guilty of the offense charged, and if after you have heard all the evidence you have a reasonable doubt of Mr. Allen's guilt as to any count, it is your duty to vote not guilty as to that count, to all of which the defendant excepted as being in the nature of an instruction to the jury before the evidence is in and premature.

#### Point No. 54

The court erred in overruling the objection of defendant's counsel to the question asked the witness Porter: "Q. Mr. Porter, did you receive some stock in the Lucky Friday Extension Mining Company which you sold through Pennaluna and Co.?" on the ground that it is incompetent, irrelevant and immaterial, unless the question is confined to whether or not he purchased any from Mr. Allen or any other defendant, incompetent to prove any issue against defendant Allen and improper cross-examination, and in permitting the witness to answer: "A. I personally did not."

#### Point No. 55

The court erred in overruling the objection of defendant's counsel to the question asked the witness Porter: "Q. And what did Mr. Allen say the rea-

son was that he wanted to use your name in disposing of this stock?" on the ground that it is improper cross-examination, not within the issues in the case and not material or relevant so far as any issue made against defendant Allen is concerned, and in permitting the witness to answer: "A. He wanted to raise some money for the payroll."

Point No. 56

The court erred in admitting in evidence, over the objection of defendant, Plaintiff's Exhibit No. 123 (two checks to B. W. Porter from Pennaluna & Co. April, 1947) on the ground they are incompetent, irrelevant and immaterial to prove any issue in this case, improper cross-examination, no proper foundation laid for presentation of checks to go to prove any issue in this case, and lead the jury to conjecture.

Point No. 57

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 124 (2 checks to B. W. Porter from Lexington Co. 5/9/46 and 10/30/46, and one from Montana Leasing Co. by Allen 7/1/46) on the ground they are not competent to prove any issue made in this case and irrelevant.

Point No. 58

The court erred in admitting in evidence on cross-examination of witness Allen, over objection of defendant, Plaintiff's Exhibit No. 125 (15 checks from



Independence Co. to Allen in 1943 and 1944) and Plaintiff's Exhibit No. 126 (check from Independence Co. to Sherman W. Smith March 31, 1943) on the ground that they are incompetent, irrelevant and immaterial and because of the fact that objection was sustained on behalf of government made to examination of witness Denney concerning his examination at this time into Independence and his answer that what he did was merely cursory, and indicating, as they do, a movement of the government through its cross-examination to go into these same things upon which they objected and were sustained.

Point No. 59

The court erred in overruling the objection of defendant to the question asked the witness Eleanor Keane on rebuttal: "Q. And did you ever hear Mr. Allen make any statement concerning Mr. Keane, your husband, with respect to whether or not he was, Mr. Keane was his partner?" on the ground that no proper foundation laid by that question to this witness, for the purpose of impeachment, and permitting the witness to answer: "A. He's referred to him as his partner in my presence many times."

Point No. 60

The court erred in overruling and denying the motion of defendant, made at the close of the evidence and testimony on behalf of plaintiff and defendant Allen and after respective counsel for both

parties have stated to the court that each of said parties had rested and completed its case, to have the court order the entry of a judgment of acquittal of all offenses of any kind or nature as charged, alleged and laid in each and every one of the counts in said indictment against said defendant (omitting herefrom all counts on which defendant Allen was acquitted) on the ground that plaintiff has wholly and completely failed to prove and establish beyond a reasonable doubt all the material facts and allegations alleged in Count VII of the indictment to support any charge of crime alleged therein, and that as to Count VII of the indictment, the testimony of the accomplice, defendant Francis Clayton Keane, fails to establish any conspiracy as charged in the indictment, if credible, and in any event that the character of said witness is such under the evidence that his testimony is wholly insufficient and incredible to establish a conspiracy as alleged in Count VII or to connect this defendant therewith.

### Point No. 61

The Court erred in instructing the jury, at the close of the testimony on behalf of plaintiff and defendant, as contained in Volume 3, pages 1195 to 1240, to which the defendant then and there objected and excepted before the jury retired to consider its verdict, in the following particulars, namely,

1. That in the giving of said charge and instructions the court used the term "investigate" in dis-

cussing the duty of the jurors to examine the exhibits, after referring to them, and without in any wise indicating to the jurors that this investigation should be taken and considered in conjunction with all other evidence in the case, including the oral testimony, and the use of the term "investigator" under the circumstances is misleading and prejudicial to the defendant and eliminates the jury's consideration of their duty in relation to these exhibits to examine them as jurors and not to investigate for the purpose of trying to find a reason to convict, as distinguished from an impartial investigation of all the facts, and the attempt of the court to later correct this portion of his instructions did not meet the objection made thereto.

2. That the instructions as to credibility of accomplice is erroneous and misleading in this, that the instruction included reference to defendant Allen and the measuring of his testimony in the same respect as other witnesses, and required express evidence of corroboration as to his evidence to render the same acceptable to the jury, whereas as a matter of law that evidence is corroborated throughout and in relation to all facts by the presumption of innocence, which has the force and effect of evidence and makes the evidence of a defendant different from that of another person which has to be corroborated, whether it is evidence that has been impeached by contradictory statements or by any other means known to law, because the evidence of the defendant is supported and corroborated sufficiently

to make it acceptable, but not binding to the jury, without further corroboration.

3. That the form in which the instructions were given tend to permit the jury to convict for aiding and abetting without participating in a conspiracy.

4. That as to the force and effect to be given in event the jury believed the defendant Allen had testified falsely in some part of his testimony requiring that evidence not found to be false must be corroborated by other evidence, whereas the same is presumed to be corroborated by the presumption of innocence.

5. That the instructions permit the jury to find the defendant guilty of a conspiracy without the testimony of Keane or Grismer, whereas and under the state of the record there is no sufficient direct evidence without the use of the testimony of Keane or Grismer to establish the elements of the conspiracy charged, and that to find the elements of that conspiracy by circumstantial evidence, the jury should have been advised that such circumstantial evidence to establish that element must be consistent with but one hypothesis or one theory, namely, guilt beyond a reasonable doubt, and cannot be consistent with innocence.

6. That the instructions in relation to the jury finding that Allen's way of keeping books was designed to conceal the state of the record is not based upon evidence, and presupposes Allen's participation in some wrongful act without first advising the jury that in order to find the defendant Allen



guilty of the failure to keep proper records of the corporation, it must be first established that he conspired with Keane or Grismer, particularly Keane in this particularity, because Keane was keeping the books, and not Allen, in the keeping of improper books.

### Point No. 62

The court erred in submitting to the jury, over the objection of defendant, the form of verdict as being confusing, misleading, and likely to result in an unforeseen prejudicial verdict against the defendant, and in disregard of the request of the defendant that a verdict be submitted in the alternative on each count separately, for example, that "We the jury find the defendant James Allen guilty of Count I in the indictment.", and immediately under that paragraph "not guilty of Count I" and a like designation as to each of the counts.

### Point No. 63

The court erred in refusing to give defendant's offered instruction No. 3, which is as follows:

"You are instructed that before you can find the defendant Allen guilty of any of the offenses charged in the indictment you must first find from the evidence and beyond a reasonable doubt that said defendant Allen did knowingly and with fraudulent intent devise and intend to devise the identical scheme and artifice to defraud charged in the indictment and did knowingly and fraudulently intend thereby to obtain from the purchasers of treasury stock, as elsewhere defined in these instructions,



money received from the public sale of said stock, and unless such fraudulent intent did actually exist at the time the treasury stock of said corporations, or either thereof, was offered to the public for sale, defendant Allen is not guilty of the offenses so charged, and it is your duty to acquit the defendant Allen, and in this connection you are instructed that it is not material if the funds procured by the sale of said stock were diverted for other purposes, if you find they were so diverted, if such diversion was not contemplated at the time of the offering of said stock for sale."

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

#### Point No. 64

The court erred in refusing to give defendant's offered instruction No. 6, which is as follows:

"You are instructed that there is no evidence in this case from which you may legitimately infer that the defendants, in order to create an appearance of mining activity on the part of the Extension and Pilot companies, did expend a small portion of the funds belonging to said corporations on the mining properties thereof for the purpose of increasing the market value of defendants' promotion stock. To the contrary the evidence is that in excess of \$100,000 was employed in legitimate mining operations, and the inference which you must draw from this evidence is that of innocence."

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

Point No. 65

The court erred in refusing to give defendant's offered instruction No. 7, which is as follows:

“You are instructed that the Government has produced no evidence in this case that the defendant Allen has schemed and conspired to conceal from the stockholders of said Lucky Friday Extension and Pilot companies information concerning the receipts and expenditures of moneys of said corporations.”

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

Point No. 66

The court erred in refusing to give defendant's offered instruction No. 8, which is as follows:

“You are instructed that the Government has produced no evidence in this case that the defendant Allen has schemed and conspired that proper books of account of the Lucky Friday Extension and Pilot companies would not be kept and maintained.”

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

## Point No. 67

The court erred in refusing to give defendant's offered instruction No. 11, which is as follows:

“You are instructed that the stock issued by the Lucky Friday Extension Mining Company and the Pilot Silver-Lead Mines, Inc., in connection with the transactions mentioned in the testimony in this case falls into three classifications: First, promotion or vendor's stock which was issued to the owners of the mining properties or contracts therefor that were to be transferred to the companies; second, attorney's stock which was stock issued for services of attorneys in incorporating and organizing said corporations, making title examinations, and passing on the legality of other matters connected with the organization of said corporations; and, third, treasury stock which was stock placed in the treasury and offered for sale to the public in accordance with SEC rules and regulations.”

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

## Point No. 68

The court erred in refusing to give defendant's offered instruction No. 12, which is as follows:

“You are instructed that the defendant Allen had a right to sell promotion or vendor's stock which came into his possession at any time after one year from the date of the first public offering of stock by either the Pilot or Extension companies respec-

tively had expired, whereupon the mere sale thereof was no fraud upon the public or the purchasers thereof, and the matters and things set forth in the prospectus for the offering of treasury stock would constitute no matter upon which fraud in the sale of said promotion or vendor's stock could be based.

“And therefore you are not to consider any acts charged in the indictment as being proven by sales of promotion or vendor's stock by defendant Allen after the expiration of one year from the date of the first public offering of such stock, unless you further find by the evidence and beyond a reasonable doubt such sale was made in furtherance of an unlawful conspiracy.”

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

#### Point No. 69

The court erred in again instructing the jury at length as set forth in Volume 3, at pages 1269 to 1277 of this Transcript of the Record when the jury returned into court more than twenty-four hours after the case had been submitted to it and the jury had been deliberating on their verdict during said time, and asked the court if the first paragraph of Count I of the indictment was incorporated in each of the other counts of the indictment and to which the answer was simply that it was and after the jury had already been thoroughly instructed on all counts, and the jury did not indicate confusion as



to the law and the need of further instructions from the court, to the giving of which instructions at said time the defendant then and there objected and excepted on the grounds and for the reasons that said additional instructions do not in direct, simple and understandable language to a layman answer the one simple and direct question asked by the jury; that while the gist of the answer is contained in additional instructions, the answer is so concealed by divers, numerous and extensive other instructions as to elements not inquired of by the jury as to wholly conceal the answer to the question propounded by the jury, and the remaining portions of the additional instructions are not the answer to the direct question of the jury, but are in answer to a condition of mind which the court assumed the jury entertained not directly disclosed by their question, the court assuming there were two problems troubling the jury, one whether or not the defendant is charged seven times with the same offense, and the other whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count, and that thereby the additional instructions given by the court tends to distract the minds of the jury from their duty as deliberators, and from the answer which they sought to have elicited, and tend to accentuate the particular matters to which the additional instructions relate, and serve only to further perplex and to confuse the jury and to re-impress upon their minds the essence of the instructions



commonly known and referred to as “plaintiff’s instructions”, that is, instructions usually tendered by plaintiff in a criminal case, and tend to single and point out certain matters and things to be proven which it must be assumed the jury understood, or they would have, when asked if there was further confusion, stated to the court, and that further, in an instance or two in the court’s additional instructions, and in dwelling upon the essential elements to be proven in relation to the various counts, the court omitted to state in connection with each count that one or more of the objects of the scheme and the scheme itself set forth in paragraph 1 of each count of the indictment, must be proven in connection with each and every overt act committed and in connection with the indictment; that there were some defects in the instructions given by the court at the close of the case and the additional instructions are in some respects in conflict with the instructions previously given by the court; that a jury of laymen cannot possibly differentiate between those portions of the law set forth in the first set of instructions and those portions of the law as set forth in the second set of instructions to which the said second set of instructions apply and modify; that the additional instructions can do nothing but confuse the jury, are not of aid to the jury and minimize the force and effect of the first instructions requested by defendant and given by the court or given by the court of his own motion, securing to the defendant the right of proper consideration of his case by the court and of a fair

trial; that the mind of the layman, as well as the mind of a lawyer, cannot grasp a copious set of instructions as has been given by the court as necessary in these cases under the law and where the indictment contained seven different counts, and the giving of specific instructions at a later time would cause the jury to overlook the force and effect of previous instructions given, and that the defense of the defendant has been materially prejudiced by the giving of the subsequent and later instructions. In other words, the jury in this case has had submitted to it at two different times two sets of instructions which are in some respects conflicting and contradictory and have greatly confused the issues to the material prejudice of defendant and his defenses.

Point No. 70

The court erred in denying the motion of defendant for an order discharging and dismissing the jury, made after the jury had been deliberating on their verdict more than twenty-eight hours, on the ground that the jury had sufficiently deliberated upon the verdict, having come before the court, requested additional instructions, and having been given such instructions and not having reached a verdict within a reasonable time, more than twenty-eight hours having elapsed since the case was given to the jury, and a verdict of either kind, guilty or not guilty, reached by the jury after this stage will be one resulting from coercion resulting from requiring a further consideration of the case.

## Point No. 71

The court erred in overruling and denying the motion of defendant, made upon return of the jury's verdict and the polling of the jury, renewing the motion of defendant for judgment of acquittal submitted to the court at the close of the government's case (Point No. 48) and at the close of all the testimony on behalf of both plaintiff and defendant Allen (Point No. 60) as to Count VII of the indictment, the defendant having been found not guilty of all other counts of the indictment.

## Point No. 72

The court erred in denying the motion of the defendant that the verdict of guilty returned against him by a jury in this court on Count VII of the indictment on June 19, 1949, be arrested and that no judgment and sentence be imposed thereon for the following reasons, to wit:

1. That the offense alleged and set out in Count VII was not and has not been proved as against the defendant by any competent or legal evidence, or any evidence whatsoever;

2. That the finding of the jury that defendant herein was guilty upon Count VII was and is wholly and inherently inconsistent and wholly and completely repugnant with, and to, its finding of not guilty upon Counts I, II, III, IV, V and VI of said indictment, and that there was not and is not any legal evidence or any evidence whatsoever to support the verdict of the jury on Count VII of

the indictment other than the exact and self-same facts alleged and pleaded in detail and received in evidence in support of the other counts, namely, Counts I, II, III, IV, V and VI, which were likewise pleaded in the same exact detail in support of Count VII; that the jury in view of, and after consideration of, all of the self-same and exact facts and allegations pleaded in detail in Counts I to VI of the indictment and repeated in Count VII found the defendant not guilty upon each and every one of said Counts I to VI, inclusive, and upon the facts pleaded in support of said counts; and therefore all of said facts in Counts I to VI should be eliminated in toto when considering said Count VII; that this being done, there was, and is, no legal evidence or evidence of any kind whatsoever in fact or law to support the verdict in any manner whatsoever on Count VII; and,

3. That there was and is no evidence in view of the above, sufficient to prove, that the defendant did commit or has committed any offense against the United States of America, as to Count VII of the indictment.

### Point No. 73

The court erred in denying the motion of the defendant to have the court order a verdict of not guilty as to him on Count VII of the indictment herein, or for a new trial as to Count VII, on the grounds set forth in Point 72, and the additional grounds as follows:

1. The verdict of the jury on Count VII is contrary to the evidence in this cause and the law.

2. Errors by the court in the reception and exclusion of evidence were prejudicial to the defendant.

3. The court erred in its charge and instructions to the jury.

4. That no conspiracy in view of the grounds set forth in Point No. 72 has been proved by the government and the government has failed to prove any criminal intent or either separate or joint and concerted criminal action on the part of defendant, and has failed to connect the defendant in any manner whatsoever with the crime set out in Count VII in view of and because of the grounds set forth in said Point No. 72.

#### Point No. 74

The court erred in submitting the case to the jury and in entering the judgment and imposing a sentence in the manner and form as the evidence is wholly insufficient to support a verdict or a judgment based thereon.

The said evidence is insufficient so far as defendant Allen is concerned in that it fails to show:

1. Any agreement, express or implied, by defendant Allen with either or both of the other two defendants to conspire or combine or confederate or agree with each other to violate the Mail Fraud statute or the National Securities Act.

2. Any wrongful or unlawful intent or purpose



on the part of defendant Allen to defraud purchasers of stocks of Extension or Pilot companies or to obtain money or property by any unlawful means whatsoever in the sale of said stocks or otherwise.

3. The evidence is insufficient to show that defendant Allen promoted or organized Extension or Pilot companies or that he caused to be issued a large portion of the stock of these corporations to himself or any one for or on his behalf or that he or any one for or on his behalf concealed or had reason to conceal his connection with said companies or the receipt by him of any part of the stock of said companies to be taken by the promoters or organizers thereof.

4. That this defendant Allen had anything to do with the issuance of large blocks of stock in said companies to the attorneys mentioned in the indictment in this case under any pretense whatever that said stock was in payment of attorney fees in order to conceal the true amount of stock issued to defendants or for any secret arrangements of any kind whatsoever.

5. That this defendant Allen had anything to do with the sale of stock in said corporations to investors or in connection therewith made any representations whatsoever as to the use of the proceeds therefrom for the exploration or development of the mining properties of said corporations.

6. That this defendant Allen had anything to do with maintaining proper or any books or records

of account or concealed any facts from the stockholders of said corporations concerning receipts or expenditures of moneys of said corporations.

7. That this defendant Allen appropriated or diverted from said corporations a large or any amount of such corporate moneys to his own use or benefit.

8. That this defendant did anything whatsoever to create an appearance of mining activity on the part of these corporations or to increase the market value of any promotion stock of said companies by spending a small portion of the funds belonging to said companies on their mining properties or to dispose of any stock belonging to him by selling it to the investing public without disclosing the appropriation or diversion of large amounts of the funds of said corporations by defendant Keane, an officer and attorney of said corporation.

9. That the defendant Allen defrauded any purchasers of stock of Extension or Pilot by any unlawful means whatsoever—

(a) As to use of net proceeds to be received from sale of Extension or Pilot stock by said corporations.

(b) As to the names of the promoters or persons in control of said corporations.

(c) As to the fact that promoters would hold their stock for investment.

(d) As to accounting safeguards which would insure proper use of corporate funds, or

(e) As to amounts of stock issued to promoters or for legal services.

10. The evidence is insufficient to show that this defendant Allen, or any person for or on his behalf committed any of the overt acts set forth in Count VII of the indictment in furtherance of any conspiracy or to effect any of the alleged objects thereof.

11. The evidence is insufficient to show a continuing conspiracy as alleged in the indictment commencing prior to June 1, 1945, and continuing to the date of the indictment so that even conceding there might have been a conspiracy, all relations between defendants Keane and Allen were terminated, according to the testimony of defendant Keane, by a quarrel between them in November 1946, by the transfer in December 1946 of the Lexington bank account by having its directors provide who could endorse checks and by the entry of defendant Grismer and others into Keane's office and the removal of Extension books therefrom, and said alleged conspiracy exhausted itself in December, 1946, and was supplanted by an alleged new conspiracy starting in December, 1946; in other words, there were two separate, disconnected, distinct and independent conspiracies, if any at all.

12. That the evidence is insufficient to show any confederacy or combination or agreement between

any of the defendants looking to a conspiracy to violate the Mail Fraud statute or the National Securities Act, as charged.

13. The evidence is insufficient to establish the crime alleged in Count VII of the indictment against this defendant Allen.

Wherefore the appellant James Anthony Allen prays that said judgment of the District Court be reversed and the action dismissed as to the defendant Allen and for such further action as may be proper in the premises.

/s/ R. MAX ETTER,

/s/ WILLIAM E. CULLEN,

/s/ J. F. EMIGH,

/s/ J. A. MURRAY,

/s/ THERRETT TOWLES,

Attorneys for Defendant and Appellant, James  
Anthony Allen.

Receipt of copy acknowledged.

[Endorsed]: Filed December 21, 1949.

---

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE  
RECORD DESIRED TO BE PRINTED

To: Paul P. O'Brien, Clerk of the above entitled  
Court:

Appellant James Anthony Allen in the above entitled action hereby designates the following por-

tions of the record in said action which he desires to be printed in the Transcript of the Record on the appeal:

Indictment.

Bail Bond of Defendant Allen filed May 6, 1948.

Bail Bond of Defendant Allen filed May 9, 1949.

Motion of Defendant Allen to dismiss Count VII of Indictment.

Motion of Defendant Keane to make indictment more definite and certain.

Motion of Defendant Keane for Bill of Particulars.

Clerk's Memorandums of August 23, 1948, showing pleas of all defendants entered to indictment.

Order on Keane's motion for Bill of Particulars.

Bill of Particulars.

Statements of Attorneys Herman, Langroise, and Munter made to Court December 8, 1948, on withdrawal of plea of not guilty by defendant Keane and substitution of pleas of nolo contendere to each of seven counts of indictment, as contained in stenographic notes filed Dec. 10, 1948.

Stenographic notes of January 13, 1949, of proceedings on withdrawal of plea of not guilty of defendant Allen and substitution of plea of nolo contendere filed January 31, 1949.

Stenographic notes of March 21, 1949, on withdrawal of plea of nolo contendere by defendant Allen and substitution of plea of not guilty by defendant Allen to all counts of indictment filed March 25, 1949.



Motion of defendant Allen to strike exhibits and testimony.

Defendant Allen's Requested Instructions Nos. 1 to 16 inclusive.

Motion of Defendant Allen for judgment of acquittal at close of plaintiff's case.

Motion of defendant Allen for judgment of acquittal at close of all the testimony of plaintiff and defendant Allen.

Verdict of Jury.

Motion of Defendant Allen for judgment of acquittal or for new trial on Count VII of indictment.

Motion of defendant Allen in arrest of judgment.

Judgment of conviction of Allen on Count VII of indictment.

Bail Bond of Defendant Allen for \$15,000 pending determination of appeal.

Notice of Appeal.

Original Reporter's Transcript of Evidence or Proceedings on trial of defendant Allen and Court's statements on sentencing of Allen and Keane, properly certified by the clerk, excluding closing arguments of counsel to jury and examination of jurors and excluding the following matters that are immaterial for consideration of this appeal by the appellate court as are hereinafter specifically mentioned.

Original Exhibits, unless the appellate court makes an order that they need not be printed and included in the printed Transcript of the Record on appeal.

Order permitting withdrawal and transmittal of original exhibits.

Journal Entries, including those made on August 5, 1949.

Judgment of conviction of defendant Keane.

Judgment of conviction of defendant Grismer.

Orders extending time to file Transcript of Record and docket cause in appellate court.

Designation of Record on Appeal and acknowledgment of service.

Certificate of Clerk.

The portions of the Reporter's Transcript of Evidence or Proceedings on the trial which are not considered material for consideration of this appeal by the appellate court and which need not be printed are as follows: (Refers to Page Nos. at bottom in middle of page and not at right hand corner of page.)

1. Strike Page 2 commencing with the word "Whereupon" in line 5, all of pages 3 to 14 inclusive, and page 15 down through the words "Plaintiff's opening statement" in line 20, and insert in lieu thereof: "Whereupon after the jury had been duly empaneled and sworn, and prior to the opening statement made by the prosecution, the court, at the request of counsel for defendant, ordered that the witnesses be excluded from the court room while not testifying, except the advisers for the government, Messrs. Wood and Denney. Whereupon the government counsel, Mr. Erickson, made the following opening statement."

2. Strike beginning with the words "The Court",

page 43, line 6, and ending on line 2, page 44, with the words "any witness, person, matter or thing connected with it."

3. Strike on page 44, lines 11 to 15.
4. Strike on page 88, lines 9 to 20 inclusive.
5. Strike on page 97, lines 10 to 18 inclusive.
6. Strike lines 16 to 21 inclusive, page 139.
7. Strike on page 175, beginning line 10 through rest of page, all of page 176, and on page 177 through line 11.
8. Strike on page 179, commencing with line 19 "The Court: It is 4:30 now, ladies and gentlemen" through rest of page, all of page 180, and line 1 at top of page 181 "the usual admonition".
9. Strike on page 240, beginning with line 11 and ending on line 22.
10. Strike on page 290, lines 13 to 23 inclusive.
11. Strike on page 296, lines 18 to 25 inclusive, all of pages 297, 298, 299, 300 and 301, through line 12.
12. Strike on page 336 in line 5 commencing "The jury will remember" and through line 9.
13. Strike on page 336, lines 13 to 25 inclusive and page 337, lines 1 to 5 inclusive.
14. Strike on page 337, lines 15 to 25 inclusive, all of page 338 and page 339 through line 5.

15. Strike on page 408, lines 19 to 25 inclusive, and on page 409, lines 1 to 7 inclusive.

16. Strike page 410, line 25, all of pages 411, 412, 413, 414, 415 and 416 down through line 19.

17. Strike page 457, commencing with line 18, through line 7, page 458.

18. Strike line 8 to line 12 inclusive, page 498.

19. Strike commencing line 18, page 529, rest of page, and lines 1 to 24 inclusive, page 530.

20. Strike commencing line 12 through line 24, page 532.

21. Strike on page 551, commencing with line 10 through line 15, page 552.

22. Strike on page 557, line 13 through line 3, page 558.

23. Strike on page 562, commencing with line 4 through rest of page, all of page 653 and page 564 through line 10.

24. Strike on page 592, lines 17 to 21 inclusive.

25. Strike on page 595, lines 4 to 12 inclusive.

26. Strike commencing with line 12, page 629, through rest of page, and on page 630 through line 16.

27. Strike on page 632, commencing with line 4 through the page, all of page 633, through line 21 on page 634.

28. Strike on page 697, lines 2 to 7 inclusive.
29. Strike page 697, commencing with line 15 through rest of page, all of pages 698, 699, and down through line 19, page 700.
30. Strike on page 749, lines 12 to 16 inclusive.
31. Strike on page 771, commencing with line 6 through the page, and through line 8, on page 772.
32. Strike on page 784, commencing with line 7, balance of page, through line 15 on page 785.
33. Strike on page 787, lines 9 to 21 inclusive.
34. Strike on page 790, lines 23, 24, and 25, and through line 4 on page 791.
35. Strike on page 791, commencing with line 11 through rest of page, and through line 14 on page 792.
36. Strike on page 792 commencing with line 19 through rest of page, and through line 9 on page 793.
37. Strike on page 809 commencing with line 15 to end of page, and through line 5 on page 810.
38. Strike on page 813 lines 6 to 22 inclusive.
39. Strike on page 829 commencing with line 10 through balance of page, all of pages 830, 831, 832, 833, 834, and on page 835 to and including line 19.
40. Strike on page 838, lines 13 to 25 inclusive, and on page 839, lines 1 to 12 inclusive.



41. Strike on page 842 in line 9 the words “which show sales by James A. Allen” and lines 10 through 25, and on page 843, lines 1 to 3 inclusive.

42. Strike on page 872 commencing with line 7 through balance of page, and on page 873 through line 5.

43. Strike on page 881, lines 22 to 25 inclusive, and on page 882, lines 1 to 3 inclusive.

44. Strike on page 920 in line 3 commencing with the words “The jury will keep” rest of line and all of lines 4 to 21 inclusive on said page.

45. Strike on page 929, commencing with line 14 balance of page and page 930 lines 1 through 15 inclusive.

46. Strike on page 932 lines 21 to 25 inclusive, and on page 933 lines 1 to 20 inclusive.

47. Strike on page 948 lines 1 to 7 inclusive.

48. Strike on page 950 lines 11 to 25 inclusive.

49. Strike all of page 1093 and page 1094 through line 15.

50. Strike on page 1208 line 5 commencing “Now ladies,” and lines 6 to 25 inclusive on said page, and on page 1209, lines 1 to 17 inclusive.

51. Strike on page 1212 commencing with line 23 through page, and all of pages 1213, 1214, 1215, and 1216 through line 19.

52. Strike on page 1218, commencing with line

6 through page, all of pages 1219, 1220, 1221, 1222, 1223 through line 16, and lines 22 through 25 on page 1223, pages 1224, 1225 and page 1226 through line 5.

Dated at Spokane, Washington, December 16, 1949.

/s/ R. MAX ETTER,

/s/ WILLIAM E. CULLEN,

/s/ J. F. EMIGH,

/s/ J. A. MURRAY,

/s/ THERRETT TOWLES,

Attorneys for Defendant and Appellant, James Anthony Allen.

Receipt of copy acknowledged.

[Endorsed]: Filed December 21, 1949.

---

[Title of Court of Appeals and Cause.]

ADDITIONAL DESIGNATION OF PORTIONS  
OF RECORD DESIRED TO BE PRINTED

To: Paul P. O'Brien, Clerk of the above entitled court:

The United States of America, Appellee in the above entitled action, hereby designates the following additional portions of the record in said action which it desires to be printed in the transcript of the record on appeal:

1. Appellant's designation 8 commencing with

line 19 on page 179 through line 1 at the top of page 181.

2. Appellant's designation 36 commencing with line 19 on page 792 through line 9 on page 793.

3. Appellant's designation 39 commencing with line 10 on page 829 through line 19 on page 835.

4. Appellant's designation 40 commencing with line 13 on page 838 through line 12 on page 839.

5. Appellant's designation 41 commencing with line 9 on page 842 through line 3 on page 843.

6. Appellant's designation 44 commencing with line 3 on page 920 through line 21 of the same page.

7. Appellant's designation 50 commencing with line 5 on page 1208 through line 17 on page 1209.

(The foregoing designations of additional portions of record to be printed referred to by pages are the Reporter's page numbers typed on the bottom of the pages.)

Dated this 20th day of December, 1949.

/s/ HARVEY ERICKSON,

/s/ FRANK R. FREEMAN,

/s/ DONALD J. STOCKING,

Attorneys for Appellee.

[Endorsed]: Filed Dec. 23, 1949.



United States  
Court of Appeals

For the Ninth Circuit

JAMES ANTHONY ALLEN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

BRIEF OF APPELLANT

*Upon Appeal from the United States District Court,  
Eastern District of Washington,  
Northern Division.*

R. MAX ETTER,

WILLIAM E. CULLEN,

726 Paulsen Building,  
Spokane, Washington.

THERRETT TOWLES,

1231 Old National Bank Building,  
Spokane, Washington.

J. F. EMIGH,

55 West Broadway,  
Butte, Montana.

JAMES A. MURRAY,

1624 Eye Street, N. W.,  
Washington, D. C.,

*Attorneys for Appellant.*





## INDEX

	Page
JURISDICTION .....	1
STATEMENT OF THE CASE .....	3
COUNT VII OF INDICTMENT .....	3
THE EVIDENCE .....	5
(a) Keane was in control of financial affairs of Extension, Pilot, Independence, Delaware, Montana Leasing, and Lexington Silver-Lead .....	5
(b) Keane's Conversions .....	6
(c) Keane's Excuse for Conversions .....	8
(d) Keane's testimony indispensable to convict Allen on conspiracy charge .....	12
(e) Record evidence disproved Keane's testimony as to fi- nancial condition of Montana Leasing in spring of 1945 .....	14
(f) Source of Allen's personal investment in Montana Leasing .....	20
(g) Payment of \$20,000 of Pilot funds to Coeur d'Alene Mines for Coeur d'Alene Consolidated .....	22
(h) Allen's interest in Extension and Pilot affairs .....	23
(i) Extension and Pilot stock issued for attorneys' fees .....	28
(j) Keane's termination of relations with Allen and Grismer .....	29
(k) Settlement contract between Keane and Allen and trust agreement .....	34
(l) Record conclusively established Grismer was not a conspirator .....	36
INSTRUCTIONS .....	42
QUESTIONS INVOLVED AND MANNER IN WHICH RAISED .....	48
SPECIFICATIONS OF ERRORS .....	51
ARGUMENT .....	66
POINT I. Allen did not conspire with Keane and Grismer, or either of them, to violate the mail fraud statute or the National Securities Act, as charged in Count VII of the Indictment .....	66
POINT II. Conspiracy as charged between Keane, Allen, and Grismer terminated December 26, 1946, and did not con- tinue after that date. There were two separate conspir- acies, if any at all .....	72

POINT III. Grismer had no knowledge of alleged agreement to divert funds of Extension and Pilot, as testified to by Keane, nor of diversion of funds by Keane, nor did he profit therefrom. Grismer was not a conspirator.....	77
POINT IV. Certain instructions originally given were erroneous. Action of court in giving second set of instructions during deliberations of jury was reversible error....	81
POINT V. Verdict of acquittal of Allen of all substantive counts of indictment and conviction of conspiracy count is not only inherently inconsistent and repugnant and lacks sufficient evidence to support it, but conspiracy count is improperly included in indictment.....	91
POINT VI. Conspiracy conviction of Allen should not be upheld where prosecution for substantive offenses was adequate and purposes served by adding conspiracy charge was to get procedural advantages over defendant to ease way to his conviction .....	100
CONCLUSION .....	104
APPENDIX .....	105
Mail Fraud Statute .....	105
National Securities Act, 15 U. S. C. A. Sec. 77e .....	105
National Securities Act, 15 U. S. C. A. Sec. 77q .....	106
Conspiracy Statute .....	108
Impromptu Statement Made by Defendant Grismer at Stockholders' Meeting of Pilot on August 7, 1948 .....	108
First Set of Instructions: Court's Instructions to Jury at Close of All the Testimony .....	116
Second Set of Instructions: Court's Instructions to Jury After Jury Had Been Deliberating on Its Verdict for More Than Twenty-four Hours .....	164

## CITATIONS

CASES:	Page
Allis v. United States, 155 U. S. 117, 15 S. Ct. 36, '39 L. ed. 91 .....	89
Blumenthal v. United States, 332 U. S. 539, 559, 92 L. ed. 154, 159, 68 S. Ct. 248 .....	67
Boyet v. United States, 5th Cir. 48 F. 2d 482 .....	82
Burkhardt v. United States, 6th Cir. 13 F. 2d 841 .....	79
Burton v. United States, 196 U. S., 283, 49 L. ed. 482 .....	89
Copeland v. United States, 5th Cir. 90 F. 2d 78 .....	79
Dunn v. United States, 284 U. S. 390, 52 S. Ct. 189, 76 L. ed. 356, 80 A. L. R. 171, on cert. from 9th Cir. 50 F. 2d 779 .....	98
Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 39 S. Ct. 435, 63 L. ed. 853 .....	89
Fiswick v. United States, 329 U. S. 211, 67 S. Ct. 224, 91 L. ed. 196 .....	75
Harrison v. United States, 2d Cir. 7 F. 2d 259, 263 .....	102
Independence Lead Mines Co. v. Kingsbury, 9th Cir. 175 F. 2d 983 .....	7
Kotteakos v. United States, 328 U. S. 750, 66 S. Ct. 1239, 90 L. ed. 1557 .....	102
Krulewitch v. United States, 336 U. S. 440, 69 S. Ct. 716, 93 L. ed. 790, 799.....66, 68, 78, 80, 97, 100, 101, 102,	103
Langer v. United States, 8th Cir. 76 F. 2d 817 .....	80
Lucadamo v. United States, 2d Cir. 280 F. 653 .....	79
Marino v. United States, 9th Cir. 91 F. 2d 691 .....	76, 79
People v. Whipple (N. Y.—Cases in Circuit Courts and Oyer and Terminer), 19 New York Common Law Reports, no page number, 9 Cowen 708 @ 709, 710, 711 .....	85
Terry v. United States, 9th Cir. 7 F. 2d 28, 30 .....	103
United States v. Falcone, 2d Cir. 109 F. 2d 579, 581 .....	78
United States v. Falcone, 311 U. S. 205, 61 S. Ct. 204, 85 L. ed. 128 .....	78
United States v. Ford, 9 Otto 594, 25 L. ed. 399, 401 .....	84

	Page
United States v. Hirsch, 100 U. S. 33, 34, 25 L. ed. 539, 540....	78
United States v. Kissell, 218 U. S. 607, 31 S. Ct. 124, 54 L. ed. 1178 .....	76
United States v. Lee, 4 MacLean 103, 26 Fed. Cases No. 15, 588, page 910 .....	85
United States v. Liss, 2d Cir. 137 F. 2d 995, 998 .....	76
Von Moltke v. Gillies, 332 U. S. 708, 68 S. Ct. 316, 92 L. ed. 309 .....	101
Weniger v. United States, 9th Cir. 47 F. 2d 692, 693 .....	78, 79
CONSTITUTION OF THE UNITED STATES, AMENDMENT V .....	49
STATUTES:	
15 U. S. C. A. Sec. 77e, Appendix page 105 .....	2
15 U. S. C. A. Sec. 77q, Appendix page 106, 107 .....	1, 2
18 U. S. C. A. Sec. 88, Criminal Code, Sec. 37, Appendix page 108 .....	1
18 U. S. C. A. Sec. 338, Criminal Code, Sec. 215, Appendix page 105 .....	1, 2
28 U. S. C. A. Sec. 41, Subd. (2), Judicial Code, Sec. 24, amended, Subd. (2) .....	2
28 U. S. C. A. Sec. 1291 .....	2
TEXT BOOKS AND LEGAL PAMPHLETS:	
2 Bishop, New Criminal Procedure, 2d Ed. Sec. 1015a (5)....	99
5 C. J. S. "Appeal and Error," Sec. 1768-1769, page 1136....	90
5 C. J. S. "Appeal and Error," Secs. 1763(e), 1785(a) .....	91
Note: "The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants," 62 Har- vard Law Review, Dec. 1948, page 276, cited in footnote 10, page 629, Krulewitch case .....	102



United States  
Court of Appeals  
For the Ninth Circuit

---

JAMES ANTHONY ALLEN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

No. 12437

---

BRIEF OF APPELLANT

---

JURISDICTION

This is a criminal action by the United States as plaintiff against James Anthony Allen, Francis Clayton Keane, and Joseph Valentine Grismer as defendants based on an indictment of the grand jury returned May 6, 1948, charging in seven counts use of the mails to defraud, fraud in the sale of securities, and conspiracy. Counts I, II and III of the indictment charge violations of the Criminal Code, Section 215, Title 18 U. S. C. A. Section 338, using the mails to promote fraud; Counts IV, V, and VI charge violations of Title 15 U. S. C. A., Section 77q, fraudulent sale of securities by mail; and Count VII charges violation of the Criminal Code, Section 37, Title 18 U. S. C. A. Section 88, conspiring to commit offenses against United States in violating said Title 18 U. S. C. A.

Section 338, said Title 15 U. S. C. A. Section 77q, and Title 15 U. S. C. A. Section 77e, using mails when no registration statement in effect (2). The statutes covered by the indictment are set out verbatim in the Appendix.

The jurisdiction of the District Court existed under Judicial Code, Section 24, amended, Subdivision (2), Title 28 U. S. C. A. Section 41, Subdivision (2), in force at time of filing of indictment.

Allen pleaded not guilty to all counts of indictment (67), was tried before a jury, and found not guilty on all of the substantive counts of the indictment, being Counts I to VI, inclusive, and guilty on the conspiracy count, Count VII (88).

Allen appeals to this Court from the judgment of conviction on Count VII of the indictment, entered July 16, 1949, which committed Allen to imprisonment in the penitentiary for a period of eighteen months (93). Upon entry of said judgment his bail was increased from \$2,000 to \$15,000; bail bond in the sum of \$15,000 was filed and approved July 22, 1949 (15, 94), and he was released on bail pending the determination of this appeal. Notice of appeal was filed by Allen in the office of the Clerk of the District Court on July 25, 1949 (97). This Court has jurisdiction to review the judgment under Title 28 U. S. C. A. Section 1291.

## STATEMENT OF THE CASE

## Count VII of Indictment

Count VII alleged in effect a continuing conspiracy existing between defendants from prior to June 1, 1945, to date of indictment to violate mail fraud statute and federal Securities Act by using mails for purpose of defrauding purchasers and prospective purchasers of stock of Lucky Friday Extension Mining Company and Pilot Silver-Lead Mines, Inc., hereinafter referred to as Extension and Pilot, respectively, and to obtain money and property by means of false representations, in that defendants:

1. Promoted and organized Extension and Pilot and issued large portion of stock of said corporations to themselves, but concealed fact that defendant Allen was a promoter of these corporations or was to receive any part of the stock to be taken by defendants;

2. In order to conceal the true amount of stock issued to them caused large blocks of such stock to be issued to Elmer E. Johnston and James E. Gyde under pretense that such stock was in payment of attorneys' fees, but with secret arrangement that a portion of such stock or the proceeds from its sale would be turned back to defendants;

3. Caused these corporations to sell stock to investors upon representation that proceeds would be used for exploration and development of mining properties of Extension and Pilot;

4. Appropriated and diverted from these corpora-

tions a large amount of such corporate moneys to their own use and benefit;

5. Defrauded purchasers of stock of Extension and Pilot by false and fraudulent representations as to the

(a) Use of the net proceeds to be received from sale of stock by these corporations,

(b) names of promoters and persons in control of these corporations,

(c) fact that promoters would hold their stock for investment,

(d) amounts of stock issued to promoters and for legal services.

Only the allegations of Count VII covering what the court later instructed the jury to be the essential elements of the alleged scheme to defraud have been referred to.

The alleged scheme to defraud set forth in Paragraph I of Count I is by reference made a part of all other counts, and as to Count VII, court instructed jury that a scheme to defraud when scheme is conducted by two or more persons is in substance and effect also a conspiracy (1208-1209, 1270).

Allen was acquitted six times on this same and identical scheme to defraud or conspiracy supported by the same evidence on which he was convicted on the conspiracy count and the jury found in effect that on that same evidence the government had not proven to its satisfaction beyond a reasonable doubt that Allen

participated in or was a party to said scheme to defraud or conspiracy (88).

### THE EVIDENCE

(a) Keane was in control of financial affairs of Extension, Pilot, Independence, Delaware, Montana Leasing, and Lexington Silver-Lead.

Keane organized Extension in June, 1945, and Pilot in January, 1946. Grismer became president of Extension and Keane its attorney. Keane became president of Pilot and his stenographer its vice president. The properties of these companies were acquired from Grismer. Public offerings of stock of Extension netted \$178,000 and of Pilot \$100,000. Of these moneys Extension expended on mine development \$65,000 and Pilot \$10,000. Grismer was mine manager for both companies. All records of these companies were kept in Keane's office which issued all stock. Keane handled all funds and issued all checks. (Pltf's Exs. 68, 69, 81, Deft's Exs. C, T, U; 179-186, 219-226, 384, 387, 395, 615, 631-632, 641.)

Keane as president of Independence Lead Mines Company, hereinafter referred to as Independence, had absolute control of its assets, including stock in Clayton Silver Mines. Independence advanced to Montana Leasing Company, hereinafter referred to as Montana Leasing, during 1943 to 1945, inclusive, about \$125,000. Keane sold through his personal account in private transactions 218,000 shares of Clayton stock for about \$112,000 and accountant on Keane's statements charged this to Montana Leasing (241, 224, 673-674, Deft's Ex. L).



Keane caused Montana Leasing, with properties in Montana, to be organized and became its president. Its successor, Lexington Silver-Lead Mines, Inc., was organized by Keane in 1945. Independence and Delaware Mines Corporation agreed to and did invest capital in development of the Montana properties, for which these companies received production notes and substantial stock interests. Allen had charge of its mining operations only. (Deft's Ex. G, H, 681-684, 1029, 1056, 1108-1113.)

**(b) Keane's conversions.**

There was not even a reasonable doubt as to Keane's guilt in diverting the moneys of Extension and Pilot. The court said that Keane by virtue of his office, his name, and his signature was guilty to an absolute certainty whether he pleaded *nolo contendere* or not, and that he admits conversion (Black, 663, 1290.)

The important testimony in this case concerns the conversion of the money (Black, 906). The court termed Keane "the evil Mr. Keane"; that Keane was "confessedly evil," and referred to "those evil acts of Mr. Keane." (929, 930, 931.)

There is also testimony that Keane forged Allen's name to a promissory note from Montana Leasing Company to Independence Lead Mines Company for \$60,000 dated October 14, 1944 (Deft's Ex. M, Pltf's Ex. 95) which Allen first saw in March, 1947, with no names on it (Allen, 1075-1076), and that Keane forged Allen's name to a check dated December 3, 1945, of J. A. Hogle and Company, Butte, payable to Allen for

\$6,872.95 (Pltf's Ex. 105; 824) representing the sale of Extension stock through his name, which Allen never delivered to said firm and which check he never received nor saw until it was introduced at the trial (Allen, 1076-1078, 1092). Allen never at any time authorized Keane or Mrs. Vermillion to sign his name on notes or checks (1090-1091).

This is the same Keane referred to in the dissenting opinions in the case of *Independence Lead Mines Co. v. Kingsbury* (1949), 9th Cir. 175 F. 2d 983, as a criminal.

Randall's audit of Extension, Exhibits A, C, Schedule 1b thereto, shows that between July 28, 1945, and May 17, 1946, \$113,000 was checked out of Extension funds by Keane as attorney for the company and run through the bank account of Montana Leasing and its successor, Lexington Silver-Lead, on which the latter through Keane returned \$28,310.35, leaving balance due of \$84,689.65 (Deft's Ex. T).

Randall's audit of Pilot, Exhibits A, C, Schedule 1 thereto, shows that between May 22 and August 23, 1946, \$81,300 was checked out of Pilot funds by Keane as president and run through Lexington Silver-Lead bank account, on which he returned \$20,635.67, leaving balance due of \$60,664.33. That he advanced \$1,200 to War Eagle Silver-Lead Co., \$3,000 to Extension, and \$10,000 to Independence (Deft's Ex. U).

Keane testified there was no corporate action taken by these companies authorizing the diversion of these moneys (658).

(c) **Keane's Excuse for Conversions.**

It is appropriate at this point to consider Keane's excuse in mitigation of his criminal conduct—habitual intoxication at the time the offenses were committed—advanced for the purpose of having the Court accept his plea of *nolo contendere* and later to secure a light sentence by the Court both by reason of his intoxication, his possible disbarment as an Idaho attorney, and his assistance to the government in the prosecution of Allen.

Keane admitted on cross-examination that the statements made to the Court (Judge Driver) by his counsel in his presence on December 8, 1948, when he offered to plead *nolo contendere* might have been embellished somewhat (Keane 754-755, 29-30).

Keane's counsel at that time also told the Court that it was not entirely a habit of whiskey that had brought about his condition, but the doctors found that it was a result, in part, of malnutrition, and since he went to the hospital and took treatments, there had been a great change in Keane, a complete rehabilitation and since that time he is able to carry on and engage in the practice of law (30).

The Court, in accepting the plea of *nolo contendere* stated that "during the time of the commission of the offense charged he was drinking heavily and continuously" and as a professional man of his age "the man is entitled to a chance to avoid disbarment if he can" (46).

Keane testified on direct examination that Allen took full charge of the negotiations and negotiated on behalf of Extension the contract between Extension and Lucky Friday Silver-Lead Mines Company, known as "Big Friday" (mentioned in the Extension prospectus) because "at the time, if I recall correctly, I was under the influence of intoxicating liquor" (658).

When defendant's counsel was testing Keane's memory on cross examination on the Independence audit, the following occurred:

“Q. Is there any reason, Mr. Keane, that you have no recollection of any of these things?

A. Yes.

Q. What is it?

A. Intoxication.

Q. During what period of time?

A. Oh, from shortly after Mr. Allen and I were very active together I drank very heavily, up until the fall of '47.

Q. Until the fall of '47?

A. That is correct; very heavily. I was practically a common drunkard.

Q. I see; you don't recall any of these things, then?

A. I recall some of them, yes. I had moments of sanity at intervals, but I was drinking very heavily.” (697.)

Keane says he was drinking when he participated in the organization of Montana Leasing Company (700) and he testified on cross-examination as to Deft's Ex. J, Independence minutes of June 29, 1943, as follows:

“Q. And pursuant to that investigation didn't you have these minutes drawn and dictated in 1947?

A. I question whether or not I was competent at any time during the year 1947 to draw any minutes or do anything else.

Q. \* \* \* well, Mr. Keane, was there any time that you can recall between the fall of 1946 and say, June of 1947, when you were competent?

A. Well, it would be at very slight intervals.

\* \* \* \* \*

Q. There were very few intervals?

A. That's right.

Q. You, however, in June of 1947, did you become fairly competent in June of 1947?

A. Not too competent.

\* \* \* \* \*

Q. Well, let's go a little farther; in July of 1947?

A. Probably a little worse.

Q. A little worse or a little better?

A. A little worse than I had theretofore.

Q. And was this a matter of drinking at that time?

A. Absolutely.

Q. It was?

A. Yes.” (737.)

He supplied very little information for the complaint he filed in a civil action against Allen, Grismer and others at Wallace, Idaho, in June, 1947, because he was incompetent at that time (738), and his physical



condition was not good at the time he paid Horning in June, 1946, a \$10,000 fee for legal services in some Independence litigation, which he took from Pilot funds, but it was not as bad then as it got later (751), and he testified:

“Q. \* \* \* Is there any way, Mr. Keane, that you have of telling us, any standard that you know of, by which you know now that at certain particular times you were all right to do business, and at other times you weren't? Can you tell us now how you happened to know, or knew?

A. Well, if I didn't remember what had occurred, the next morning, I figured I was not in shape.” (753.)

and again:

“Q. Now, getting back to another question with respect to your statements about your recollection in 1947, what was the condition of your health during the early part of 1947?

A. Well, my nerves were in terrible condition, and I was undernourished, I wasn't eating regularly, I was depending upon whiskey as nourishment, and late in the fall I discovered that it had affected my heart, sclerosis of the liver, and high blood pressure, all of which I am still suffering from.” (759.)

Allen testified on cross-examination that in spite of Keane's drinking he did not have any real suspicion at the time to question the manner in which Keane was handling the bank accounts, as follows:

“Q. Well, you knew he was drinking at this time, didn't you?

A. Oh, not any more than he is right now, or any more than Mr. Horning is drinking, or Mr.

Jones. If Mr. Keane was an incompetent during that time it was deceptive to Mr. Hull, the attorney for the Marquard-Kingsbury lawsuit that settled with him in June, 1946, Mr. Horning, Mr. Jones, and all of them, as well as it was to me.” (1114.)

(The Jones referred to is O. L. Jones, manager of bank at Wallace, 1060.)

And Keane’s wife testified that when Allen called at their home in the fall of 1946, Keane was “stone sober” and had not had a drink for over two months (1176-1179).

Nevertheless, on the pleas of Keane’s counsel to the Court just before sentencing of Keane (101), the Court said that Keane had entered a plea of *nolo contendere* some time in advance of trial and that he took the stand and testified for the government.

Judge Driver fined Keane \$1,500, suspended the imposition of any confinement under the sentence, and placed him on probation for a period of four years. The court also ordered Keane to refrain from drinking intoxicating liquor during the first two years of the probationary period, and during the probationary period to demean himself as a law-abiding, orderly, industrious citizen (117, 120-121).

**(d) Keane’s testimony indispensable to convict Allen on conspiracy charge.**

The megalomaniacal delusions of Keane did not permit him merely to furnish evidence to and assist the government in the preparation of this case (Denney, 834, 908-909, 920, 924). He became the star witness for the government at Allen’s trial by his startling and

sensational testimony of his admitted thievery and gambling with trust funds and drunkenness to such an extent that he became a common drunkard (Keane, 663-664, 697, 1181). In June, 1947, and prior to the return of the indictment, this defendant lawyer had commenced an action against Allen, Grismer, and others in the State Court at Wallace, Idaho (Keane, 738), about which Keane made a public announcement in the newspaper that he had "borrowed" all the money in question (Allen, 1148) which he in this trial admitted that he had embezzled.

Keane testified that in the early spring of 1945 a large sum of money had been spent on Montana Leasing Company's properties and the company was in financial difficulties (610).

In order for the government to prove the gist of the crime of conspiracy, to-wit, an agreement among conspirators to commit an act in violation of the federal statutes and a corrupt intent and wrongful purpose, Keane was the key witness for the government and he testified that Allen proposed that they incorporate the Extension ground, make some money out of the promotion of the Extension, if they could, and bail themselves out (611-612).

The government contended through the testimony of Keane that a partnership existed between Keane and Allen; that on October 5, 1943, they commenced operating as a partnership under the firm name of Montana Leasing Company, and that they were equally interested in Keane's share of the stocks he received from

the attorneys and vendors of Extension and Pilot and his promotion stock in Pilot (Keane, 610, 614, 622-623, 630, 659-660, 701-703, 707), and through Keane's testimony a 1943 federal income tax return of Keane and Allen as a partnership, prepared by Randall, was admitted in evidence (Pltf's Ex. 93) solely for the purpose of showing Keane was contending in 1944 there was a partnership between the two of them, although Allen did not sign it, nor did Keane mail a copy to him (Keane, 739, 762-766).

Allen denied that any such partnership ever existed. In March, 1947, Allen approved the terms of Deft's Ex. M, \$60,000 production note dated October 14, 1944, of Montana Leasing to Independence and would have executed it if it was the instrument of the corporation, and stated that Montana Leasing Company was never a partnership (1075-1076, 1152).

Also, thirty-one of the exhibits offered by the government were identified by and introduced through the testimony of Keane (631, 634, 636, 640, 641, 642, 650, 651, 652, 655, 766, 768, 769, 781, 788).

(e) Record evidence disproved Keane's testimony as to financial condition of Montana Leasing in spring of 1945.

Allen vehemently denied making any such proposal to Keane as Keane testified to. Allen testified:

“Q. Now, you heard the testimony here by Mr. Keane that in the middle of 1945 you and Mr. Keane had to figure something out to bail yourselves out?

A. I did, and that's—

Q. What have you to say to that statement, Mr. Allen?

A. Well, it is not only the worst falsehood that was ever spoken, but it's a ridiculous statement." (1066.)

Allen stated that he first became interested in Extension after the stock had been sold; that by October, 1945, the market on all stocks had become very good and the original issue of Extension stock was sold overnight (1037, 1141); there was a good, strong, firm demand for mining stocks, and that was true of Pilot and Extension stocks (Johnston, 604).

Allen explained there was no necessity from the records for bailing out as Keane had stated:

"Q. Why do you say that?

A. Well, after seeing the Independence audit, and having the Delaware records, the royalties paid during the year for the Delaware Mines Corporation, which was investing all of its money, in addition to my personal investment, if Mr. Keane's audit of Independence was correct, which was committed to the financing the same as the Delaware, the operations at the mine for the month of January of 1945 was \$6,140.08; February, \$6,642.53; March, \$6,341.04; April, \$5,077.41; May, \$5,976.94; June, \$4,971.67; July, \$6,007.74, and August, \$4,266.87. If \$3,000 a month additional expense was added to that, there would still be a balance in August of twenty some thousand dollars.

Q. A balance of twenty some thousand?

A. A balance ready for finance between the Independence and the Delaware and combined with what I personally put in, not knowing what Mr. Keane might have put in.



Q. There would have been \$20,000 in the bank?

A. Yes, assuming there was an additional \$3,000 a month, that I don't say there is." (1066-1067, 1078.)

Approximately \$70,000 was checked out of Delaware, and should have gone into Montana Leasing, or its successor, Lexington Silver-Lead. The smelter checks went to Keane and would be deposited from his office (Allen, 1091, 1120-1121). Keane's financial transactions were handled in such a way that an audit of Delaware might not show what that company received and invested in Montana Leasing. Keane deposited in some instances smelter settlement checks of Delaware directly in Montana Leasing account (5 items of Pltf's Ex. 9a; Keane, 639) and check for loan of \$6,000 by Callahan to Delaware was deposited on Keane's instructions directly into Montana Leasing account (Keane, 645).

Montana Leasing had no other obligations, except perhaps outstanding payroll checks of about \$1,000; the commitments to Independence and Delaware were not pressing obligations as they were payable out of production and the contracts for acquisition of property were not a liability as they were payable out of smelter returns (Allen, 1067).

In the middle of 1945 Allen did not know how much money Keane was putting into Montana Leasing from the Independence treasury, nor did Keane himself know the exact amount. Allen tried to have Keane have an audit of Delaware and Independence made each year, but Keane would procrastinate in doing so (Allen, 1068; 1127). Checks of Independence to Allen to

June, 1943, were loans to Lexington Mining Company secured by mortgage and for Lexington payrolls, repaid to Keane personally as he requested for Independence (Pltf's Ex. 125) ; total checks paid back to Keane for Independence at that time amounted to \$29,408.88 (1123-1124).

During 1945 Allen wrote his personal checks totaling \$4,500 for Montana Leasing and they were deposited through Keane's office to Montana Leasing (Deft's Ex. X; 1068) and another thousand the bank record will show but he has not been able to find the slip (1069). During 1946 he gave his personal checks to Montana Leasing or its successor, Lexington Silver-Lead, totaling \$70,000 (Deft's Ex. Y), plus two checks, one dated August 17, 1946, for \$3,000, and one dated November 19, 1946, for \$2,000 shown on bank statement, but he cannot find the checks, a total of \$75,000 (1070). During 1947 he gave personal checks to Lexington Silver-Lead on his personal funds amounting to \$76,000 (Deft's Ex. Z, 1071) and in 1948 personal checks amounting to \$27,500 (Deft's Ex. AA, 1071). These payments from Allen's personal funds totaled \$184,000.

The answer to Denney's testimony that there were twenty deposits made out of Extension and Pilot funds when there were overdrafts in Montana Leasing bank account (875) was given by Keane himself when he testified that as to overdrafts appearing on bank statements of Montana Leasing or Lexington Silver-Lead, the account was not actually overdrawn; when checks

would come in, the bank would notify his office and arrangements would be made to cover them during the day, so that while the bank statements show an overdraft, it actually was not an overdraft; there were funds on hand to pay those checks (619).

When Allen took over Extension and Pilot with Mullen and Grismer, the companies were without funds and Keane had permitted the charter and articles to lapse (Allen, 1073). So Allen, in addition, personally advanced moneys to Lexington Silver-Lead account in order to save bookkeeping costs and advanced on behalf of Extension and Pilot in 1946 and 1947 to Grismer \$15,147.85, to Mullen \$5,815.03 (Deft's Ex. BB) and on November 20, 1946, advanced to Pilot \$7,000 (Pltf's Ex. 18, Allen, 1071-1074).

Montana Leasing had a development cost in 1945 of about \$70,000; and in 1946 about \$56,000 (1078).

Summaries of monthly operations at the mine prepared from daily mine records of Montana Leasing for 1945 and 1946 were admitted in evidence, Deft's Exs. DD and EE (1099). These are not intended to be a statement of the financial affairs of the company for 1945 and 1946. Keane secured the bank statements from the bank at Wallace and was supposedly keeping ledgers for that purpose (Allen, 1099).

Allen, on cross-examination, testified:

“Q. Were you acquainted with the financial condition of the Montana Leasing Company in 1945, or the Lexington Silver-Lead Mines, as to

whether or not they had money enough to operate at that time?

A. I believe you would find, as we see it now, that at no time in connection with the operations was it the practice of keeping a surplus of funds in the Montana Leasing or the Lexington Silver-Lead in itself, but to draw from the treasury of the Independence or the Delaware or personal, as it was needed.

\* \* \* \* \*

Q. Whose job was it to see that there was money enough in the bank to cover the payroll checks?

A. Mr. Keane assumed that authority, because of the heavy investment of the Independence.

Q. Isn't it a fact that in 1945 that the Montana Leasing Company or the Lexington Silver-Lead Mines was short of money and in very desperate need of a new source of funds, the Independence funds had been exhausted?

A. Not to my knowledge, Mr. Erickson. The Independence funds according to that audit were not exhausted, the Montana Leasing Company was not pressed for any money, and if it had been, it could have been shut down on ten minutes' notice, if that was the case.

\* \* \* \* \*

Q. Well, you wouldn't know the condition of the Montana Leasing Company in 1945 from an audit made in 1947, would you?

A. No, I would know it from Mr. Keane.

Q. What did Mr. Keane tell you about that?

A. Well, that at all times that in my (his) opinion the Independence had sufficient money to carry through.

Q. Didn't he state to you that the money had run out from Independence about 1945, and that some other source of money would have to be secured?

A. He never did; it was never mentioned." (1127-1129.)

**(f) Source of Allen's personal investment in Montana Leasing.**

Allen further testified on cross-examination to the source from which he obtained the money to personally invest in Montana Leasing. From proceeds from sales of Extension stock for the years 1945 to 1948, inclusive, he received \$72,411.76.

Also, \$9,000 from sales of Pilot stock in 1947, and sales of Merger, Hunter Creek, Rainbow, Callahan Consolidated, Silver Syndicate, mortgages on his house and car, and personal loans without security, so that he now owes \$50,000 (1137-1140). After he and Grismer were left with the bare corporations, most all sales of stock were made through his accounts; Extension stock was sold at an average price of 8.966c or \$73,-423.01, and 525,000 shares of Pilot at an average of about 3c per share, or \$15,750.00, totaling about \$89,000 (1166). Allen put more money into Montana Leasing than he received from the sale of stock or what he has drawn out chargeable against his personal account by about \$80,000 (1167).

Allen had an agreement with Grismer for 300,000 shares of Extension, and Grismer would get stock in other companies that Allen owned in the Mullan area or that would be formed (1042, 1141). Allen's verbal agreements with Grismer on their stock deals were



made September 1, 1945, and April 29, 1946, and reduced to writing in 1948 (Grismer, 401-402; Pltf's Exs. 67, 67a, admitted 404). The stocks involved were in many different companies (Allen, 1103-1104). It was not a partnership agreement but a continuing agreement to trade and exchange certain stocks, after he and Grismer had to take the records and companies away from Keane in order to keep the companies together, it was just a question of using the stocks for the purpose of getting sufficient money to keep the companies together (1142-1143).

The court instructed the jury that Allen had the legal right to sell any stock in Pilot or Extension owned by him upon the following conditions:

(1) That such sale occurred after the expiration of one year after the date of the first offering of such corporation's stock for sale through an underwriter, or

(2) Upon broker's transactions executed upon customer's order on any exchange or in the open or counter market, but not on the solicitation of such orders; and further, that this right of Allen to legally sell any such stock would only extend to such stock as he was selling independent of any criminal scheme or conspiracy to violate the mail fraud law or the Securities Act (1219).

Allen testified that Pltf's Exs. 116 and 117, showing sales by Allen of Extension and Pilot stocks are substantially correct, but Pltf's Ex. 114 shows a sale of 25,000 shares of Extension in November and December,

1945, which stock Keane gave him for his right to purchase Allen's option on Delaware stock of 500,000 shares of Baumgartner stock, which option Keane exercised; this was free stock; and Allen used his wife's maiden name in this transaction, not to conceal his activity in Extension stock, but because he was very fond of his wife and family. As for the sale of 30,000 shares of Extension shown on this exhibit for \$6,872.95 in Allen's name through J. A. Hogle & Co., Allen never delivered the stock to the brokers or received the check (1091-1093, 1164-1165). Sales by Allen of vendor's stock of Extension and Pilot were made more than a year after the two original issues of Extension and original issue of Pilot to the public (1093-1095), or on broker's transactions executed upon customer's order in the open or counter market, unsolicited by Allen, as shown by the evidence.

**(g) Payment of \$20,000 of Pilot funds to Coeur d'Alene Mines for Coeur d'Alene Consolidated.**

The cashing of a check at Wallace, Idaho, of E. J. Gibson & Co., for \$40,000 on May 22, 1946, was overt act No. 8 of Count VII of the indictment (12). Pilot audit, Ex. C, Schedule 1, (Deft's Ex. U) shows the following:

“Note 1: The charge of \$20,000 on May 22, 1946, does not actually represent a check written. The company received a check for \$40,000 from E. J. Gibson & Co. on May 22, 1946, of which \$20,000 was deposited to the account of Lexington Silver-Lead Mines, Inc., and \$20,000 was deposited to the account of Pilot Silver-Lead Mines, Inc.”

On May 22, 1946, Keane was both president of Pilot

and president of Coeur d'Alene Consolidated. Pursuant to the terms of escrow agreement between Coeur d'Alene Consolidated and Coeur d'Alene Mines dated May 23, 1946 (Pltf's Ex. 39) prepared by Keane and Horning when Keane was president of Coeur d'Alene Consolidated (Allen, 1160) and according to Keane's testimony as to the juggling of this \$40,000 check (Pltf's Ex. 13) and not shown on Randall's audit, Keane took \$20,000 of Pilot money and on May 23, 1946, purchased a \$25,000 cashier's check for Coeur d'Alene Mines on behalf of Coeur d'Alene Consolidated (Pltf's Ex. 39; Keane, 629). The bank's transactions were with Keane (Kraemer, pro-manager Idaho First National Bank, Wallace, 315, 316).

Allen testified that the first time he saw the \$40,000 check was in the district attorney's office and that he did not deliver it to Keane (1088-1089). Allen's understanding is that Keane received from the bank the cashier's check for \$25,000 and gave it to Horning, who delivered it to Coeur d'Alene Mines at a meeting at 7:30 P. M. on May 23rd (Allen, 1161); that Keane was borrowing Gyde's money of \$15,000; that Horning and others were to put up cash also, and Keane said he would take care of it all (Allen, 1161).

**(h) Allen's interest in Extension and Pilot affairs.**

The government contended that Allen was an active participant in the affairs of Extension and Pilot, but was concealing his interest. Keane testified that he and Allen discussed the organization and promotion of Extension and that it was understood that Allen

could not become a promoter of Extension because of an SEC consent injunction against Lexington Mining Company and Allen in the federal court at Seattle on June 4, 1943, which involved sales of Lexington-owned Callahan stock (Pltf's Ex. 121, Keane, 612-614). The filings for Extension and Pilot, including the prospectuses, were prepared by attorney Johnston under Regulation A, claiming exemption from full registration (Pltf's Exs. 81 and 89; Johnston, 575-576); there was a three-year limitation on the injunction under that regulation (Johnston, 541; Allen, 1132), and when Keane employed Johnston to qualify Extension with SEC in May, 1945, he advised Johnston that Allen was under a civil injunction and that Allen would have no active part in the handling of any projects until the limitation expired (Johnston, 540-541). Because of the representations made to him by Keane and Grismer that Keane was going to run and look after the Pilot, Johnston stated in the Pilot prospectus that the company was promoted by Keane and its activities to date were completely controlled and dominated by him, and the work that Allen was doing and the advice he was giving to Grismer did not change his opinion as to who was dominating the company. Neither Keane nor Grismer ever told Johnston that Allen was promoting these companies, and the statements in the prospectuses are his conclusions from all the facts he could gather (Johnston, 595-600). Allen did not consider that the injunction prevented him from entering any mining organization (1131). Grismer told the SEC

officials Allen was not a promoter of these companies (426).

In addition to Keane and Grismer, the following witnesses were called by the government to show that Allen was an active participant with Keane in the affairs of these companies:

Mrs. Irene Vermillion, Keane's stenographer and vice president of Pilot (149) and the girl who handled the financial part of the companies (Erickson, 140), who could not have helped but know of Keane's defalcations of Extension and Pilot funds from the start to the finish but did not tell on her boss;

Attorney Horning, who, on behalf of Big Friday, negotiated a lengthy contract with Allen, who was principal negotiator for Extension (258);

Attorney Gyde, who was employed by Keane to perform legal work for Pilot (277-278);

Mrs. Emaline A. Phelan and W. H. Herrick of Cincinnati Mining Company, with whom Grismer negotiated with Allen's help the acquisition by Pilot of the Phelan and Cincinnati claims (283, 295), the consideration for these deals being paid by Keane (294, 304);

Beatrice McLean French, secretary of Callahan Consolidated, who assisted Mrs. Vermillion with stock transfers when Evans became ill (326-357);

Glynn D. Evans, secretary-treasurer of both Extension and Pilot, who worked in Keane's office at the time and who was instructed by Keane to mail the let-



ters and certificates of Extension stock to the brokers, and who allowed Keane to usurp the duties of his office as treasurer of both companies, and who was permitted, over objection, to testify that Keane and Allen were dominating the Extension, but he really did not know what part Allen had in it, nor much about the organization (Evans, 360-362, 367-368, 374-375); and,

Attorney Johnston, who was attorney for Hunter Creek and Silver Dollar Mining Companies and experienced in SEC matters, and who was employed by Keane to prepare and make the filings of Extension and Pilot with the SEC (537, 578, 595).

While Horning may have been the "master" (Keane, 722), Grismer a "dupe" (Black, 1290) and a "cat's paw" (Driver, 61-62), and Keane was the admitted embezzler (Erickson, 147), Allen was a good arbitrator, administrator, and conciliator, a man who was trying to get everybody together, a man who in the fall of 1945 was proposing to put a deep shaft down farther north than the Hunter Creek property and carry on a big extensive, deep development program called the Big Hunter project named after the Gold Hunter Mine, in addition to the three-way project for deep development of Hunter Creek, Extension and Big Friday; there were repeated rows and fights and Allen thrashed them out (Johnston, 580-592).

Herrick testified that there is a long tunnel that goes through the Gold Hunter property; that Allen discussed with him this central development plan, using the Gold Hunter as the axis, and that he was negoti-

ating with the owners of Gold Hunter in Chicago, and if able to acquire that property, his plan of consolidation on this central development would include Big Friday, Extension, Pilot, Hunter Creek, Idaho Silver, Cincinnati, and other properties in that section of Idaho (301-303). Grismer testified to the same effect (449) and added "that was the nucleus of the whole thing" (451).

Allen testified as to the properties that could be developed by putting them all into a central development, because of the vein systems that traverse them and to avoid questions that might arise as to extralateral rights through separate development by various companies, and that such development be done through the Gold Hunter Mine which had two or three miles of underground workings with shaft from the tunnel to the 1,200-foot level, a 600-ton mill, a production record of about twenty million dollars and was located on the highway and railroad (1032-1033, 1050). He commenced active negotiations with the Gold Hunter in February, 1945, and discussed it with the owners of mining properties in that vicinity (1034-1035). The veins on Pilot dipped south and at depth would be found in other properties (1036). He went to Chicago in the summer of 1945 and met the attorney for the owners of the Gold Hunter who was also an officer of the company (1047) and made a continuing offer of \$250,000 for the property based on its physical value and went back to Chicago for said purpose in 1946 and in December, 1947, but without success (1048-

1051). He has since been negotiating with Day Mines, one of the largest mining companies in the Coeur d'Alenes (1104-1105).

**(i) Extension and Pilot stock issued for attorneys' fees.**

The indictment charged there was a secret arrangement that a portion of the stock allowed for attorneys' fees for Extension and Pilot or the proceeds from its sale would be turned back to the defendants.

Extension prospectus provided for the issuance to attorneys Johnston and Keane for legal services in forming the company and acquiring its property of 500,000 shares of Extension stock and stated that none of the proceeds of the offering made by or for the attorneys would accrue to the benefit of the company (Pltf's Ex. 69).

Likewise, the Pilot prospectus provided that the company agreed to pay attorney Johnston \$1,000 and to issue to him 50,000 shares of stock and to attorney Gyde 150,000 shares of stock for legal services in forming the company and in acquiring and grouping the mining claims; that said stock might be held as an investment or sold at the company's offering price, less commission, and that none of the proceeds, if sold, would accrue to the benefit of the company (Pltf's Ex. 68).

The facts are that Johnston talked with Keane as to his compensation for services to Extension and testified that Keane agreed that the fee would be 500,000 shares, of which Johnston would receive 75,000 shares

for attorney's fees and the use of his office in Spokane, and Keane would receive 425,000 shares. Keane mailed him the certificates in 25,000-share denominations and he endorsed and returned all of them back to Keane, except the three he retained (Johnston, 546-547).

Johnston testified that for his services to Pilot Keane paid him his cash fee of \$1,000, and he received 50,000 shares of Pilot stock (545, 576). The \$1,000 was paid by Montana Leasing check signed by Allen dated May 14, 1946, in response to Johnston's letter to Keane of May 4, 1946 (Pltf's Ex. 8-L-1, 82; Johnston, 556), delivered to him by Allen (556) at the request of Keane (Allen, 1117).

In April, 1946, Gyde agreed to terms laid down by Keane as to his compensation for legal services rendered to Pilot that he was to have 25,000 shares out of 150,000 shares to be issued to him, and the balance to be returned to Keane to pay off other persons who helped with the organization of Pilot (Gyde, 278, 279). Gyde actually did not receive a certificate for 25,000 shares, but the cash in lieu of it—Keane's checks of May 22 and 27, 1946, for \$2,500 (Pltf's Ex. 30). Two checks of Gibson company payable to Gyde (Pltf's Exs. 31, 31a) totaling \$14,500 were delivered to him by Keane, which he endorsed and returned to Keane (Gyde, 280-283).

**(j) Keane's termination of relations with Allen and Grismer.**

As Allen did not have available to him the bank records of Delaware and Montana Leasing or its succes-

sor, Lexington Silver-Lead, or Pilot or Extension, which were being kept by Keane, he did not have occasion to question Keane's integrity or his manner of handling the bank accounts (Allen, 1059, 1113); he trusted Keane implicitly because of the men Keane was dealing with (1121, 1168); and so did Grismer, who testified:

“Well, people say, ‘Why in heck did you trust him?’ I will tell you why. He was attorney for the Independence; he was president of the Independence Lead; he was attorney for the Clayton. They trusted him; why in hell shouldn't I? That is my answer, and I say, unfortunately.” (453.)

and attorney Johnston had confidence in Keane (595).

Allen, too, relied on the arrangements made by Keane to make Independence payments for Montana Leasing through Allen's name instead of directly to Montana Leasing, and he had no right to question his authority or intention for doing it that way (1124).

Allen had been trying to get from Keane audits on all companies interested in Montana Leasing since 1945, but Keane would always ask him to wait until he finished the Kingsbury-Marquard litigation with Independence. When that case was settled in June, 1946, and some \$40,000 went out of Pilot, which Allen believes went into Keane's account and then out to attorneys Horning, Hull, McCann and Langroise, he did become suspicious of Keane (1121-1122, 1147-1148, 1168). Grismer complained to Allen in September and October, 1946, that Pilot bills were not being paid, and both Allen and Grismer became suspicious of Keane



and made several trips to his house (1079-1167). Allen made demands on Irene Vermillion in September, 1946, to see the Montana Leasing records, but Keane had told her that Allen had been through for a long time and that he could see nothing (Allen, 1063-1169).

Grismer testified that the work on the Pilot ceased in December, 1946, because the bills were not being paid as the company had run out of money. He had quite a few discussions with Keane, as he was handling the money, but he never could get from him any explanations; it was always a run-around. Grismer advised and talked with Allen, and Allen seemed to be at a loss as to why the bills were not paid (Grismer, 407). Keane would evade Grismer, and in Keane's office the only one he could contact was Mrs. Vermillion, and just prior to December 10, 1946, she told him the bank deposits were in terrible shape (452-453). Grismer then knew there was something radically wrong, and on December 12, 1946, he secured a meeting of the board of directors of Extension and said to them: "I can't get any statements, can't get nothing from Keane, as to the Lucky Friday or the Pilot," and Keane was thereupon discharged as attorney for Extension, his name ordered stricken at the bank, the office was ordered moved from Keane's office to Grismer's office, and they secured stock ledger, stockholder's list and seal from Evans, then secretary in Keane's office—the rest of the books were in the safe (454). Attorney Wayne (now deceased, 1086) was employed by Grismer (Grismer, 456) and after many appoint-

ments not kept, Keane finally agreed to resign from the Pilot but wanted sixty days to get bank balances in shape (Allen, 1084-1085). The resignations of Keane, Vermillion and Evans as officers and directors of Pilot were secured February 21, 1947 (Deft's Exs. Q, R, and S; Allen, 1083-1084), but they never secured bank ledger, checks, etc. (1085). Grismer had called on Allen and between Allen and Wayne the resignations were secured (Grismer, 456; Deft's Ex. C). At the meeting of February 21, 1947, neither Keane nor Irene Vermillion made any claim of a partnership agreement between Allen and Keane (Allen, 1086).

Allen went to Keane's home in October, 1946, and in Mrs. Keane's presence, demanded that Keane make a disclosure and complete the Lexington Silver-Lead organization and stated if he did not do so, he (Keane) would be disbarred and go to the penitentiary. He pleaded with Mrs. Keane that, if she had any influence with her husband, to use it and have him make this disclosure and quit evading everybody. Allen further told Keane that from all appearances, it looked as though Keane was short about \$100,000 in some companies (1169-1170). Allen denied making any such statement as testified to by Keane and his wife demanding that Keane turn everything over to him because he had \$200,000; that he knew of no purpose or reason for saying it, he wanted Keane to turn over things to complete these corporations, such as titles or contracts in his name, but not for the sake of giving him any money or that he (Allen) had \$200,000 and

would take it (1082). Allen was not at the time intoxicated as testified to by Keane and his wife, but was in a pleading mood to get Keane to make a disclosure (1080-1081).

In June, 1947, Allen requested of O. L. Jones, manager of the bank, the right to examine the bank account of Montana Leasing, but was refused permission because there was no written authority by the company to Allen (Allen, 1059-1060). Allen first had access to and examined checks and financial statements of Extension and Montana Leasing on January 15, 1949, in the district attorney's office and has not yet seen the checks and financial statements of Pilot, except one or two checks on a trip to the SEC at Seattle in May, 1947. He did get permission to have audit of these companies made by Randall, CPA, of which he received copies (Allen, 1060-1061).

Keane testified that the incidents which terminated his relations with Allen and Grismer were, first, when Allen called at his house late in November or early in December, 1946, after he (Keane) had run out of money of the Pilot, and quarreled with him in a noisy and belligerent manner and demanded that Keane turn everything over to him and he would take care of it, which Keane refused to do; secondly, on December 26, 1946, when Allen transferred the bank account of Lexington Silver-Lead by action of its board of directors in adopting a resolution to the bank stating who could draw checks; and thirdly, at the time when Joe Grismer, Mullen and Evans entered his office after it was

closed and removed some of the Extension books from his office—"that absolutely severed our last relation." (Keane, 661-662, 730-731).

(k) **Settlement contract between Keane and Allen and trust agreement.**

The settlement contract dated August 4, 1947, was an agreement between Keane and Allen for the settlement of a civil action at Wallace, Idaho, heretofore referred to, in the State Court brought by Keane against Allen, Grismer and others, involving the rights of Keane and Allen in certain mining stocks and properties, in which Allen denied all claims and charges made by Keane against him, particularly the claim that a partnership existed between them, while the trust agreement of the same date made by Keane and Allen as trustors established a trust for the payment of an indebtedness to Pilot of \$73,664.33 and to Extension of \$95,122.72 (Pltf's Ex. 130, admitted 1182; Keane, 1181-1187). The trust agreement was approved by Pilot and Extension (Allen, 1149).

Allen testified that Keane brought his action against Allen, Grismer and nineteen companies for a receivership on June 25, 1947, following an action brought in March or April for receivership against Independence and Keane, suits by Pilot and Extension instituted at Allen's direction through attorney Wayne against Independence and Keane for an accounting of moneys that Keane had diverted from these companies into his personal account and into settling lawsuits, and an action by Lexington Silver-Lead against Keane for an accounting, and the agreements referred to repre-

sent a negotiated settlement of this suit in order to compromise and protect Extension and Pilot (Allen, 1149-1153). Allen testified on cross-examination as follows:

“Q. Why did you sign this agreement if you were not responsible?

A. Because we had the interest of the stockholders and the corporations at heart, to clean them up, and it's the very thing that I had been trying to get Keane to do for a year and a half, to make such a disclosure and what money was his personal money and what belonged to corporations that he was in control of and handling the cash.

Q. So you were willing to sign an agreement to pay up indebtedness of the Lucky Friday Extension and the Pilot, although you were not a participant?

A. That is exactly right, and that agreement does not indicate that at all, Mr. Erickson; it indicates that these stocks are put in that trust for the purpose of liquidating the indebtedness, \* \* \*

Q. So you feel you were not responsible in any way for the shortages to Lucky Friday Extension or the Pilot Silver Lead, but still you signed this agreement?

A. Absolutely right.

\* \* \* \* \*

Q. So that all these companies were interested in compromising the lawsuit, agreed to put up the stock to get rid of the lawsuit?

A. Exactly, and to make whole if they could the Pilot and Extension, because of Keane's defalcations in it.



Q. The other companies were interested in making good his defalcations?

A. When they were named in the lawsuit as having an interest in them by Keane, you can always effect a compromise." (1156-1157, 1159-1160.)

The court fairly instructed the jury on Pltf's Ex. 130 as follows:

"\* \* \* personally I do not feel that that exhibit in any wise sufficiently weighs against the defendant to justify your returning any verdict against him on that account. It was a compromise, and it is generally the law that people make compromises for the purpose of settling that particular matter or matters, and that they do not expect to be held responsible on account of that settlement in some other transaction, and I'm letting you know that while you're free to give that exhibit the weight you think it is entitled to receive, that personally I consider that you'd be well justified in not holding that exhibit in any wise as against the defendant Allen." (1125.)

(1) Record conclusively established Grismer was not a conspirator.

Joe Grismer, miner, prospector, foreman and shift boss, was an experienced able mine operator of the Coeur d'Alene mining district, associated with operating mines of the district, a man of good character and proven ability and with a good mining reputation. He was mine superintendent of Callahan Consolidated, and was placed in charge of the mining operations of Extension and Pilot. He had lived at Wallace for about 33 years (Grismer, 382, 384, 386, 439, 452).

He located six mining claims for Extension and testified it was a mighty good piece of ground, he had

known of it for the past 25 years, and he wanted to see it developed because it had great possibilities as a mine; he entered whole-heartedly in the plan whereby he was to head Extension, take care of development, and the others were to look after all other details (384-387). He and his partners owned the Pilot group of claims for about 25 years, on which they had performed a great deal of work, and there was a mighty good showing, and when Pilot was organized, he was made mine manager; the finances were entirely out of his hands; he figured the board of directors of Pilot would play fair with everybody (393-395, 452).

Grismer's innocence of any complicity in the conspiracy charge of the indictment, and his ignorance of what was taking place with these companies was established by the government itself on his direct examination by his testimony as follows:

All negotiations by Extension with Big Friday for use of the latter's shaft were made in his absence; he was only slightly informed of what was going on, and did not know any details until the contract was brought to him for his signature as president (387). It came presumably from Keane's office because that is where everything was done (466).

He was never permitted nor had the opportunity of examining the books or anything of any kind, and therefore he would not know what took place; he never could get any information (388).

His participation in the preparation of Extension prospectus was very limited; he had no conferences

with attorney Johnston as to what went into the prospectus; he did not visit his office in connection with it (389-390).

He had no part in the handling of Extension funds which came from the brokers, wrote no checks, and had nothing to do with the company's financial affairs (390-393).

The matter of how Pilot's finances would be handled when the money was raised was entirely out of his hands (395).

He did not make the final arrangements for acquisition by Pilot of the Phelan and Cincinnati claims (396-397).

He visited attorney Johnston's office to furnish him with the history of the Pilot ground and its titles (400).

When in December, 1946, Pilot bills were not being paid and the money ran out, he never could get any explanation from Keane; it was always a run-around (407).

He had nothing to do with the issuance of cashier's check for \$25,000 to Coeur d'Alene Mines for Coeur d'Alene Consolidated, nor with the committing of the money; he never discussed with anyone the raising of the money, but knew Coeur d'Alene Consolidated had to put down an amount similar to a guarantee for entering into an agreement with Coeur d'Alene Mines to start driving a long cross-cut on the 2,800-foot level of Coeur d'Alene Mines; he was not asked to put up any of that money and would not have it; he

heard no discussions as to where that money was to come from and had no knowledge whatsoever that \$20,000 of that money came from the proceeds of Pilot's offering to the public, and any one who might have known that fact definitely did not advise him (411-412).

He received about \$2,800 over a period of years from Extension for his monthly wages of \$150 per month, and never received anything from Pilot on his agreed wages of \$200 per month (414).

He had no knowledge that the funds of Extension and Pilot were being issued to Montana Leasing and other concerns; he never to his knowledge got any of these funds and had no knowledge of any of the financial affairs of the companies and was denied access to all books and records (419).

On December 12, 1946, he got action on Extension, of which he was president, by relieving Keane of his duties and responsibilities in connection with Extension, and on February 21, 1947, after employing attorney Wayne, he got Keane and his co-directors out of the Pilot (477; Deft's Ex. C).

In May, 1947, as president of Extension and Pilot, he authorized attorney Wayne to bring suit on behalf of these companies against Independence for an accounting of moneys received by that company from Extension and Pilot (Deft's Ex. C).

About the last of July, 1947, he caused audits to be made by Randall, CPA, of Extension and Pilot rec-

ords, which showed the misappropriation of large sums of money from the treasuries of both companies (Deft's Ex. C).

Grismer further testified that he proved to government counsel that he was not guilty of the first six counts of the indictment and he proved to his satisfaction that he was not guilty of the conspiracy count, but government counsel did not see it that way, and on January 12, 1949, the six substantive counts of the indictment were dismissed as to him, and he pleaded *nolo contendere* to the conspiracy count (49; Grismer, 420-422).

On the basis of the audit of Extension (Deft's Ex. T), and on behalf of that company he persuaded the prosecuting attorney of Shoshone County, Idaho, to swear to a complaint in the Probate Court of said county and have Keane arrested on a charge of embezzlement of the funds of said company, and upon the preliminary hearing, the prosecuting attorney failed to introduce in evidence said audit and to call Randall, then in Wallace, to prove the audit and moved dismissal of the charge on the ground that the evidence was insufficient to prove there was probable cause to believe a crime had been committed and the charge was dismissed (Deft's Ex. C; affidavit of Grismer, page 3, admitted 463, 459), the facts in which affidavit sworn to February 15, 1949, Grismer stated to be very much the truth (462).

We urge the court to consider most carefully this affidavit as well as the impromptu statement made by



Grismer at the meeting of stockholders of Pilot on August 7, 1948, which was brought out on cross-examination by defendant's counsel (451-460), and which we have taken the liberty of inserting in the Appendix to this brief in full.

Grismer was the innocent victim of the prosecutor's scatter-gun to bring down the defendants and we believe he was included as a defendant in the indictment for procedural or strategy purposes only in order to carry on the proof of an alleged continuing conspiracy between Allen and Grismer down to the return of the indictment and long after Keane's evidence completely terminated a conspiracy, if there was one, on December 26, 1946.

The stigma of a convicted felon placed on Joe Grismer, which not only affects Grismer, but also his wife and two grown sons (408) is without any justification whatsoever and is not based upon the record evidence.

Judge Black said that Grismer was substantially a "dupe," a minor cog in the machine, a rather inconsequential participant, and that it was never intended, so far as the evidence shows, that he was to get anything much more than a job (1287, 1290).

At the time Judge Driver heard the offer of Grismer's lawyer for permission to enter a *nolo contendere* plea to the conspiracy count only, the United States district attorney stated to the court that, as to the Extension, Grismer never participated, he never got anything except his salary; of all the moneys that were raised for Extension, he only received a salary; as to

the Pilot, he was foreman in charge of operations, he put up the mining claims and he only was compensated for his actual work there, and there is still due him some salary for the work he did on the Pilot; that Grismer never got any of the money that was diverted from these companies except to meet the payrolls so that he did not profit. His conduct was more of negligence or carelessness than anything else, and

“I will say further that it is my belief that he’s an uneducated man, that he’s a practical miner; he knows how to drive a tunnel and sink a shaft, but he doesn’t know anything and never did pretend to know anything about business and financing a mining company.” (50-52.)

Judge Driver had said that Grismer’s part in the whole transaction was a minor one and that he was rather a “cat’s paw” of one or more of the other defendants (62), and the court suspended sentence on Joe Grismer and placed him on probation for a period of two years (118, 122.)

### INSTRUCTIONS

The court instructed the jury at the close of all the testimony (1195-1240) with what he admitted to be long, difficult and complicated instructions, to which instructions exceptions were taken by defendant before the jury retired to consider its verdict (1242-1245).

The court at that time instructed the jury, in effect, that it could only find defendant Allen guilty in the event he knowingly, wilfully and intentionally devised, joined or participated to a reasonably substantial degree in the conspiracy alleged in Count VII, and that

such conspiracy was for the purpose of doing one of the *essential elements* of the scheme to defraud, to-wit:

1. Joining or participating in any scheme to defraud purchasers or prospective purchasers of stock of Extension and Pilot, or either thereof, and to conceal the fact that he was a promoter of said companies or either thereof, and that he was such a promoter before or during their organization;

2. Participating in such scheme, knowing and intending that Extension and Pilot, or either thereof, were to sell stock to investors upon the representation that the proceeds thereof would be used by said corporations for the exploration and development of their mining properties and that, in fact, to defendant's knowledge such proceeds were not so used;

3. Joining or participating in such scheme with the intention that a portion of the money due the corporations from their treasury stock would be appropriated and diverted from Extension and Pilot, or either of them;

4. Joining in such scheme as to Extension and Pilot, or either thereof, intending and agreeing that certain stock in said companies, or either of them, would be given to any attorney or attorneys under the pretense that it was for attorney's fees, but that actually a part of it would come back to him as a promoter for the purpose of defrauding the public;

Provided, however, that the evidence established beyond all reasonable doubt that Allen helped, joined

in, or participated in such conspiracy knowingly, wilfully, and intentionally before the doing of at least one overt act in Spokane, Washington, in order to give the federal court in the State of Washington jurisdiction (1234-1235, 1237).

The court also instructed the jury, in effect, that the proof to their satisfaction of any portion of the charges other than one or more of the essentials just mentioned would not justify conviction, but if the jury found beyond all reasonable doubt one or more of said essentials, coupled with knowingly, wilfully and intentionally devising, joining or participating in the scheme or conspiracy, and thereafter the doing of at least one overt act in Spokane, Washington, such would substantiate conviction (1246).

The court also instructed the jury that neither the testimony of Keane nor Grismer was necessary to the government's case against Allen, provided the jury was convinced beyond all reasonable doubt of Allen's guilt from the other testimony (1229-1230), to which defendant's counsel excepted, inasmuch as the instruction permits the jury to find defendant guilty of a conspiracy without the testimony of Keane or Grismer, whereas and under the state of the record there is no sufficient direct evidence without the use of the testimony of Keane or Grismer to establish the elements of the conspiracy charged, and that to find the elements of that conspiracy by circumstantial evidence, the jury should have been advised that such circumstantial evidence to establish that element must be con-

sistent with but one hypothesis or one theory, namely, guilt beyond a reasonable doubt, and cannot be consistent with innocence (1244).

The morning after the case was submitted to the jury and had been argued by counsel for both sides, and the jury had not then agreed upon a verdict, the court read to counsel a set of further instructions which he desired to give the jury for the purpose, as the court said, of narrowing the issues as to each count (1250-1251), to which defendant's counsel objected and stated:

“\* \* \* we do not believe that minds of the laymen, and I think that also applies to the mind of a lawyer, can grasp a copious set of instructions as has been given by the court as necessary in these cases under the law, and the giving of specific instructions at a later time we believe would cause the jury to overlook the force and effect of previous instructions given, and we certainly want the record to show that the defendant feels that his defense will be materially prejudiced if these instructions are given, and for those reasons.” (1253-1254.)

The court then stated he would not insist upon giving such further instructions to the jury at that time “or until the jury may request instructions, if it so does” and summarized defendant's counsel's objections as follows:

“The substantial objections of the defendant to the suggested instructions of the court are that to give the instructions at this time without a request by the jury will do two things: first, confuse the jury, and second, accentuate in the jury's minds these instructions given without the instruc-



tions given yesterday, the general instructions which would remain in effect \* \* \*.” (1255-1256.)

More than twenty-four hours after the case had been submitted to the jury, and the jury had been deliberating on their verdict during said time, the jury returned into court and asked the court if the first paragraph of Count I of the indictment was incorporated in each of the other counts and to which the answer was simply that it was (1264-1268), and after the jury had already been thoroughly instructed on all counts and the jury did not indicate confusion as to the law and the need of further instructions, the court proceeded to give to the jury another set of long, difficult and complicated instructions on the premise that there were two problems troubling the jury, one, whether or not defendant was charged seven times with the same offense, and the other, whether or not it was necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count (1269).

At this point it will be noted that the court had already told the jury that as to the mail fraud Counts I to III, inclusive (1205), as to the security fraud Counts IV to VI, inclusive (1206), and as to the conspiracy Count VII (1237) and particularly as to the several features of the scheme to defraud described in the first count of the indictment (1213, 1246), it was not necessary for the government to prove beyond a reasonable doubt all elements of misrepresentation, false pretenses or promises charged but only some of

the essential ones which the court specifically enumerated in the instruction on page 1234 of the Record.

Nevertheless, at this stage of the proceedings, the court then told the jury that defendant Allen was not charged seven times with the same offense and that it is not necessary that the government in connection with each of the subsequent counts prove every allegation in the first paragraph of the first count, and the court then gave to the jury long and complicated additional instructions to which defendant's counsel excepted to the effect that the answer was so concealed by divers, numerous, and extensive other instructions as to elements not inquired of by the jury as to wholly conceal the answer to the question propounded by the jury and that they served only to further perplex and confuse the jury and to re-impress upon their minds the essence of the instructions commonly known as "plaintiff's instructions" (1263-1279).

The jury had this cause under deliberation from Friday at about 7:00 P. M. (1250) until Sunday at about 10:30 P. M. (1282).

We appreciate the difficulty which the court had in instructing the jury under the seven counts of the indictment as drawn. The court was perplexed as to how to state the nature of the scheme to defraud in Count I in concise language when the following occurred between the district attorney and the court just before the latter instructed the jury for the second time:

“Mr. Erickson: I might state this, that I believe that your Honor should instruct the jury that the scheme is set forth in Count I in detail, and define what that scheme is again in as short, concise language as possible, and then state that the other counts incorporate that same scheme by reference, and that the various respective counts, other counts, charge that the same scheme was used as Count I, to mail letters on the other dates mentioned in the other respective counts.

“The Court: Well, counsel, I’m in somewhat of unison with your views, except I’m not satisfied of my ability to state the nature of the scheme in Count I in concise language. \* \* \* (1266.)

#### QUESTIONS INVOLVED AND MANNER IN WHICH RAISED

The foregoing Statement of the Case raises questions as to (a) the sufficiency of the evidence to convict Allen on the conspiracy count; (b) as to whether the conspiracy, if any existed, was a continuing, unbroken one as alleged or whether it was terminated December 26, 1946, as testified to by Keane, or whether it continued on between Allen and Grismer after that date as a part of the original conspiracy, or as to whether there were two separate conspiracies, one between Keane, Allen and Grismer to December 26, 1946, and one between Allen and Grismer after that date, and was Grismer, under the uncontroverted evidence established by the government, actually a party to any conspiracy composed of Allen and Keane, if one existed, and if not, then did the court err in permitting the introduction of evidence as in furtherance of an alleged conspiracy between Allen, Keane and Grismer, or Allen and Keane, as to anything done by Allen and

Grismer after December 26, 1946, and did the court err in failing to instruct the jury accordingly; (c) as to whether the court erred in instructing the jury that neither the testimony of Keane, nor Grismer, was necessary to the government's case against Allen, and in giving to the jury a second set of instructions twenty-four hours after the case had been submitted to it under the circumstances and conditions heretofore pointed out; (d) as to whether, where the government supports the alleged scheme to defraud set forth in the conspiracy count of the indictment with the same evidence, the same allegations, covering the same time, set forth in the substantive counts and jury acquits defendant Allen of all substantive counts and convicts said Allen of conspiracy count, said verdict of conviction of Allen of the conspiracy count was inherently under such circumstances not only inconsistent, repugnant and therefore void, but whether it lacks sufficient evidence to sustain a conviction on the conspiracy count, was the conspiracy count improperly included in indictment, and is such a verdict in violation of Amendment V of the Constitution of the United States; and (e) whether the conspiracy conviction of Allen should be upheld where prosecution for substantive offenses was adequate and purposes served by adding conspiracy charge was to get procedural advantages over defendant to ease way to his conviction.

The manner in which these questions were raised was by the evidence and objections thereto, motions for entry of judgment of acquittal at close of plain-

tiff's case, at close of all testimony, and renewal of such motions, motion to strike from evidence all exhibits and testimony relating to matters occurring after December 26, 1946, motion for judgment of acquittal or for new trial, motion in arrest of judgment, the first instructions to the jury given at the close of all the testimony and exceptions thereto, the giving of second set of instructions as heretofore stated and exceptions thereto, verdict, judgment of conviction and commitment, indictment, and government procedure at trial.



## SPECIFICATION OF ERRORS

1. The District Court erred in overruling objection of defendant to the testimony of the witness Irene Vermillion in identifying Plaintiff's Exhibits Nos. 1 to 6, inclusive (checks of brokers deposited in bank account of Extension, deposit slips and check stubs of Extension, and checks drawn on Extension account), and all similar documents and exhibits identified in the same manner or offered in evidence, on the ground that they are incompetent, irrelevant, and immaterial, no proper foundation has been laid in this respect, the exhibits do not appear to be in the handwriting of defendant, nor to have thereon endorsed the signature of defendant; that the state of the record is such that the responsibility of the defendant or the connection of the defendant with these exhibits has not been shown; that, as to the defendant in the present state of the record, all these exhibits are hearsay; that the evidence is insufficient to establish a conspiracy and to make these exhibits competent on the theory of an act of a co-conspirator, and that the exhibits leave the jury to surmise and to speculate in respect to their competency and effect (158-159).

2. The District Court erred in admitting in evidence, during the testimony of witness Nolting and after defendant Grismer had testified, over objection of defendant, Plaintiff's Exhibit No. 72 (Gibson's ledger sheet, account of B. A. McLean) and Plaintiff's Exhibit No. 48 (six checks E. J. Gibson and Co. to cash and B. A. McLean, 1/20/47 to 9/26/47), on ground

that as to Exhibit 72 no proper foundation has been laid, not connected up in any way to prove any allegation of any count in indictment against defendant Allen, nor does it show any privity of transaction of said defendant as related to any count in indictment and it is incompetent, irrelevant and immaterial at this time, and that as to Exhibit No. 48 on the face of the exhibit each and every check so designated, beginning with January 20, 1947, and going through September 26, 1947, is incompetent, irrelevant and immaterial to prove any issue made in this case as to the joint concert alleged in counts I to VII of indictment, including those on mail fraud, security fraud and conspiracy, and on the ground that the evidence has already disclosed, and there is no contradiction that there could not have been any joint concert of action between defendants after witness Grismer and defendant Allen had thrown out or demanded and secured the resignation of Keane who is charged as an actual accomplice in all the general counts of indictment running up to present time, and that these exhibits on no theory can prove any count set forth in indictment beginning January 20, 1947; that there is no allegation there was any concert of action between Allen and Grismer and as to Grismer six counts alleging such concert of action have been dismissed; that the indictment as to every count alleges prior to June 1, 1945, and continuing to date of indictment naming each and every one of defendants as being co-conspirators with no allegation at all made that there was ever any conspiracy, so-called, existing between two separate de-

fendants beginning at any particular time, but that it was a continuing conspiracy between all three, and on the further ground that there is no connection of these checks on their face or in any other way or of the testimony developed so far with defendant Allen; and on the additional ground (when Exhibit No. 48 was reoffered and admitted upon witness Keane's re-direct examination) that on the face of each and every one of these separate items that appear in the exhibits are dates starting with the end of January, 1947, and extending as far as September 26, 1947, and on the testimony of the witness Keane himself that he considered there was no agreement or otherwise, assuming that there ever was, which this defendant denies, between him and Allen after the fall or early fall of 1946, and based further upon the testimony adduced with respect to said witness Keane and defendant Grismer that no conspiracy then could exist so far as defendant Grismer was concerned and that it is within the exempted transaction, having been made over a year after the original offering, and not claimed that it is treasury stock (493-496, 769-771).

3. The District Court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 104 (confirmation of sales by Hogle & Co. at Butte, Montana, of Extension stock, account of J. A. Allen) and Plaintiff's Exhibit No. 105 (check of \$6,872.95 of Hogle & Co. mailed to J. A. Allen December 3, 1945) on ground the exhibits are incompetent, irrelevant, and immaterial to prove any issue in this case; it is not

joined up, and no proper foundation has been laid; and the signature on the check was afterwards proved by appellant's testimony to have been forged by Keane (818, 825).

4. The District Court erred in overruling and denying the motion of defendant, made at the close of plaintiff's case and after counsel for plaintiff announced that plaintiff rested, to strike from the evidence in this cause all exhibits identified and admitted in evidence or identified or admitted in evidence pertaining to and relating to any transactions which said exhibits tend to prove and establish transpiring and occurring or alleged to have transpired or occurred subsequent to December 26, 1946, as well as all testimony relating to matters and things alleged to have transpired or occurred or which said testimony tends to prove transpired or occurred subsequent to December 26, 1946, and heretofore objected to by counsel for defendant on the following grounds, to-wit:

First, that the evidence affirmatively shows and discloses that subsequent to said December 26, 1946, as appears from plaintiff's evidence, and particularly from evidence of government's witness Francis Clayton Keane, no conspiracy existed or could have existed between this defendant and said defendant Francis Clayton Keane, or between this defendant and the defendant Joseph Valentine Grismer, or between any two or more of said three defendants, and that the evidence in behalf of plaintiff affirmatively discloses and shows that said defendant Joseph Valentine Grismer



was at no time a party to or a participant in the alleged conspiracy set forth in the indictment; that said evidence is incompetent for any purpose in the absence of affirmative proof on the part of plaintiff that at any time subsequent to December 26, 1946, the conspiracy alleged in the indictment was still in existence and it appearing from the evidence that defendant James Anthony Allen and defendant Francis Clayton Keane at no times subsequent to December 26, 1946, were on friendly relations or did conspire or scheme together to do any act unlawful or otherwise, and

Secondly, because it affirmatively appears from testimony adduced from witnesses who have been called and testified on behalf of the government that said Joseph Valentine Grismer could not be and was not a party to any conspiracy whatsoever at the time of the inception of any conspiracy as alleged in the indictment against this defendant Allen and said Francis Clayton Keane and Joseph Valentine Grismer, and therefore could not conspire with or be a party to the conspiracy as alleged in said indictment with said defendant Allen after December 26, 1946 (71, 935).

5. The District Court erred in overruling and denying the motion of defendant, made at the close of evidence and testimony on behalf of plaintiff and after counsel for plaintiff announced that plaintiff had rested and had completed its case in chief, to have the court order the entry of a judgment of acquittal of all offenses of any kind or nature as charged, alleged and laid in each and every one of the counts in said indict-



ment against said defendant (omitting herefrom all counts on which defendant Allen was acquitted) on the ground that plaintiff has wholly and completely failed to prove and establish beyond a reasonable doubt all the material facts and allegations alleged in Count 7 of the indictment to support any charge of crime alleged therein, and that as to Count 7 of the indictment, the testimony of the accomplice, defendant Francis Clayton Keane, fails to establish any conspiracy as charged in the indictment, if credible, and in any event that the character of said witness is such under the evidence that his testimony is wholly insufficient and incredible to establish a conspiracy as alleged in Count 7 or to connect this defendant therewith (83, 936).

6. The District Court erred in overruling and denying the motion of defendant, made at the close of the evidence and testimony on behalf of plaintiff and defendant Allen and after respective counsel for both parties have stated to the court that each of said parties had rested and completed its case, to have the court order the entry of a judgment of acquittal of all offenses of any kind or nature as charged, alleged and laid in each and every one of the counts in said indictment against said defendant (omitting herefrom all counts on which defendant Allen was acquitted) on the ground that plaintiff has wholly and completely failed to prove and establish beyond a reasonable doubt all the material facts and allegations alleged in Count VII of the indictment to support any charge of crime alleged therein, and that as to Count VII of the in-

dictment, the testimony of the accomplice, defendant Francis Clayton Keane, fails to establish any conspiracy as charged in the indictment, if credible, and in any event that the character of said witness is such under the evidence that his testimony is wholly insufficient and incredible to establish a conspiracy as alleged in Count VII or to connect this defendant therewith (85, 1191).

7. The District Court erred in instructing the jury, at the close of the testimony on behalf of plaintiff and defendant, as contained in Transcript of Record, Volume 3, pages 1195 to 1240, and in Appendix, pages 116 to 164, to which the defendant then and there objected and excepted before the jury retired to consider its verdict, in the following particulars, namely,

(a) That the form in which the instructions were given tend to permit the jury to convict for aiding and abetting without participating in a conspiracy.

(b) That the instructions permit the jury to find the defendant guilty of a conspiracy without the testimony of Keane or Grismer, whereas and under the state of the record there is no sufficient direct evidence without the use of the testimony of Keane or Grismer to establish the elements of the conspiracy charged, and that to find the elements of that conspiracy by circumstantial evidence, the jury should have been advised that such circumstantial evidence to establish that element must be consistent with but one hypothesis or one theory, namely, guilt beyond a reasonable doubt, and cannot be consistent with innocence.

8. The District Court erred in again instructing the jury at length, as set forth in Transcript of Record, Volume 3, pages 1269 to 1277, and in Appendix at pages 164 to 171 (after the jury had been deliberating on its verdict more than sixteen hours after the case had been submitted to it and had not then reached an agreement on its verdict, and the court had submitted to counsel a set of further instructions which he desired to give the jury for the purpose, as he said, of narrowing the issues, to which defendant's counsel objected on the ground that the giving of specific instructions at that time would only confuse the jury and cause the jury to overlook the force and effect of previous instructions given and that defendant's defense would be materially prejudiced thereby and that the court then stated he would not insist upon giving such further instructions to the jury, unless the jury requested further instructions, and after the jury had been deliberating on its verdict for more than twenty-four hours after the case had been submitted to it and had not agreed, and returned into court and asked the court in effect if the first paragraph of Count I is repeated by reference in each of the other counts of the indictment, and to which the answer was simply that it was, and after adjournment for an hour and a half and after the jury had been thoroughly instructed on all counts, and the jury did not indicate confusion as to the law and the need of further instructions from the court) to the giving of which instructions at said time the defendant then and there objected and excepted on the grounds and for the reasons that said

additional instructions do not in direct, simple and understandable language to a layman answer the one simple and direct question asked by the jury; that while the gist of the answer is contained in the additional instructions, the answer is so concealed by divers, numerous and extensive other instructions as to elements not inquired of by the jury as to wholly conceal the answer to the question propounded by the jury, and the remaining portions of the additional instructions are not the answer to the direct question of the jury, but are in answer to a condition of mind which the court assumed the jury entertained not directly disclosed by their question, the court assuming there were two problems troubling the jury, one whether or not the defendant is charged seven times with the same offense, and the other whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count, and that thereby the additional instructions given by the court tend to distract the minds of the jury from their duty as deliberators, and from the answer which they sought to have elicited, and tend to accentuate the particular matters to which the additional instructions relate, and serve only to further perplex and to confuse the jury and to re-impress upon their minds the essence of the instructions commonly known and referred to as "plaintiff's instructions," that is, instructions usually tendered by plaintiff in a criminal case, and tend to single and point out certain matters and things to be proven which it must be assumed the jury understood, or they would



have, when asked if there was further confusion, stated to the court, and that further, in an instance or two in the court's additional instruction, and in dwelling upon the essential elements to be proven in relation to the various counts, the court omitted to state in connection with each count that one or more of the objects of the scheme and the scheme itself set forth in paragraph 1 of each count of the indictment, must be proven in connection with each and every overt act committed and in connection with the indictment; that there were some defects in the instructions given by the court at the close of the case and the additional instructions are in some respects in conflict with the instructions previously given by the court; that a jury of laymen cannot possibly differentiate between those portions of the law set forth in the first set of instructions and those portions of the law as set forth in the second set of instructions to which the said second set of instructions apply and modify; that the additional instructions can do nothing but confuse the jury, are not of aid to the jury and minimize the force and effect of the first instructions requested by defendant and given by the court or given by the court of his own motion, securing to the defendant the right of proper consideration of his case by the court and of a fair trial; that the mind of the layman, as well as the mind of a lawyer, cannot grasp a copious set of instructions as has been given by the court as necessary in these cases under the law and where the indictment contained seven different counts, and the giving of specific instructions at a later time would cause the jury



to overlook the force and effect of previous instructions given, and that the defense of the defendant has been materially prejudiced by the giving of the subsequent and later instructions. In other words, the jury in this case has had submitted to it at two different times two sets of instructions which are in some respects conflicting and contradictory and have greatly confused the issues to the material prejudice of defendant and his defenses.

9. The District Court erred in overruling and denying the motion of defendant, made upon return of the jury's verdict and the polling of the jury, renewing the motions of defendant for judgment of acquittal submitted to the court at the close of the government's case (83, 936) and at the close of all the testimony on behalf of both plaintiff and defendant Allen (85, 1191), as to Count VII of the indictment, the defendant having been found not guilty of all other counts of the indictment (1284).

10. The District Court erred in denying the motion of the defendant that the verdict of guilty returned against him by a jury in this court on Count VII of the indictment on June 19, 1949, be arrested and that no judgment and sentence be imposed thereon for the following reasons, to-wit:

(a) That the offense alleged and set out in Count VII was not and has not been proved as against the defendant by any competent or legal evidence, or any evidence whatsoever;

(b) That the finding of the jury that defendant herein was guilty upon Count VII was and is wholly and inherently inconsistent and wholly and completely repugnant with, and to, its finding of not guilty upon Counts I, II, III, IV, V, and VI of said indictment, and that there was not and is not any legal evidence or any evidence whatsoever to support the verdict of the jury on Count VII of the indictment other than the exact and self-same facts alleged and pleaded in detail and received in evidence in support of the other counts, namely, Counts I, II, III, IV, V, VI, which were likewise pleaded in the same exact detail in support of Count VII; that the jury in view of and after consideration of all of the self-same and exact facts and allegations pleaded in detail in Counts I to VI of the indictment and repeated in Count VII found the defendant not guilty upon each and every one of said Counts I to VI, inclusive, and upon the facts pleaded in support of said counts; and therefore all of said facts in Counts I to VI should be eliminated in *toto* when considering said Count VII; that this being done, there was, and is, no legal evidence or evidence of any kind whatsoever in fact or law to support the verdict in any manner whatsoever on Count VII; and,

(c) That there was and is no evidence in view of the above sufficient to prove that the defendant did commit or has committed any offense against the United States of America, as to Count VII of the indictment (91, 1285).

11. The District Court erred in denying the mo-

tion of the defendant to have the court order a verdict of not guilty as to him on Count VII of the indictment herein, or for a new trial as to Count VII, on the grounds set forth in Specification of Errors No. 10 and the additional grounds as follows:

(a) The verdict of the jury on Count VII is contrary to the evidence in this cause and the law.

(b) Errors by the court in the reception and exclusion of evidence were prejudicial to the defendant.

(c) The court erred in its charge and instructions to the jury.

(d) That no conspiracy in view of the grounds set forth in Specification of Errors No. 10 has been proved by the government and the government has failed to prove any criminal intent or either separate or joint and concerted criminal action on the part of defendant, and has failed to connect the defendant in any manner whatsoever with the crime set out in Count VII in view of and because of the grounds set forth in Specification of Errors No. 10.

12. The District Court erred in submitting the case to the jury and in entering the judgment and imposing a sentence in the manner and form as the evidence is wholly insufficient to support a verdict or a judgment based thereon.

The said evidence is insufficient so far as defendant Allen is concerned in that it fails to show:

(a) Any agreement, express or implied, by defen-

dant Allen with either or both of the other two defendants to conspire or combine or confederate or agree with each other to violate the Mail Fraud statute or the National Securities Act.

(b) Any wrongful or unlawful intent or purpose on the part of defendant Allen to defraud purchasers of stocks of Extension or Pilot companies or to obtain money or property by any unlawful means whatsoever in the sale of said stocks or otherwise.

(c) The evidence is insufficient to show that defendant Allen promoted or organized Extension or Pilot companies or that he caused to be issued a large portion of the stock of these corporations to himself or any one for or on his behalf or that he or any one for or on his behalf concealed or had reason to conceal his connection with said companies or the receipt by him of any part of the stock of said companies to be taken by the promoters or organizers thereof.

(d) That this defendant Allen had anything to do with the issuance of large blocks of stock in said companies to the attorneys mentioned in the indictment in this case under any pretense whatever that said stock was in payment of attorney fees in order to conceal the true amount of stock issued to defendants or for any secret arrangements of any kind whatsoever.

(e) That this defendant Allen had anything to do with the sale of stock in said corporations to investors or in connection therewith made any representations whatsoever as to the use of the proceeds therefrom for

the exploration or development of the mining properties of said corporations.

(f) That this defendant Allen appropriated or diverted from said corporations a large or any amount of such corporate moneys to his own use or benefit.

(g) That the defendant Allen defrauded any purchasers of stock of Extension or Pilot by any unlawful means whatsoever—

(1) As to use of net proceeds to be received from sale of Extension or Pilot stock by said corporations.

(2) As to the names of the promoters or persons in control of said corporations.

(3) As to the fact that promoters would hold their stock for investment.

(4) As to amounts of stock issued to promoters or for legal services.

(h) The evidence is insufficient to show that this defendant Allen, or any person for or on his behalf committed any of the overt acts set forth in Count VII of the indictment in furtherance of any conspiracy or to effect any of the alleged objects thereof.

(i) The evidence is insufficient to show a continuing conspiracy as alleged in the indictment commencing prior to June 1, 1945, and continuing to the date of the indictment so that even conceding there might have been a conspiracy, all relations between defendants Keane and Allen were terminated, according to the testimony of defendant Keane, by a quarrel between



them in November, 1946, by the transfer in December, 1946, of the Lexington bank account by having its directors provide who could endorse checks and by the entry of defendant Grismer and others into Keane's office and the removal of Extension books therefrom, and said alleged conspiracy exhausted itself in December, 1946, and was supplanted by an alleged new conspiracy starting in December, 1946; in other words, there were two separate, disconnected, distinct and independent conspiracies, if any at all.

(j) That the evidence is insufficient to show any confederacy or combination or agreement between any of the defendants looking to a conspiracy to violate the Mail Fraud statute or the National Securities Act, as charged.

(k) The evidence is insufficient to establish the crime alleged in Count VII of the indictment against this defendant Allen (Transcript of Record, Point No. 74, 1340).

## ARGUMENT

### POINT I

Allen did not conspire with Keane and Grismer, or either of them, to violate the mail fraud statute or the National Securities Act, as charged in Count VII of the Indictment.

As announced by the Supreme Court of the United States, speaking through Justice Jackson, in his concurring opinion in *Krulewitch v. United States*, 336 U. S. 440, 69 S. Ct. 716, 93 L. ed. 790, 799:

“When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie*

the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U. S. 539, 559, 92 L. ed. 154, 169, 68 S. Ct. 248, all practicing lawyers know to be unmitigated fiction."

In the case at bar, there was no reason why the government could not have followed this orderly manner of putting in its evidence because defendant Keane, who testified to the gist of the alleged conspiracy as between him and Allen, was available to the government all through the trial; it was Keane who furnished evidence to and assisted the government in the preparation of this case for trial (834, 908-909, 920, 924). The government, however, called Keane to the stand after fifteen witnesses had testified, causing defendant to make numerous and lengthy objections to evidence, and that the jury was left to surmise or speculate as to the competency and effect of the exhibits made prior to and during Keane's examination, causing the court to reserve many of his rulings on evidence, so that, after Keane had testified, a mass of evidence was finally admitted, causing defendant's counsel in

many instances to lose track of the original objections made at the time when the evidence was first offered and ruling reserved. Under other situations, perhaps, the rule of order of introducing evidence as to conspiracy is substantially subject to the court's discretion; the building cannot all be built at once; a brick at a time must be laid (Black, 154), but that was not the situation in this case.

There was never any doubt of Keane's guilt of the crime of embezzlement of Extension and Pilot funds (Deft's Exs. T and U), for which crime he has never been punished nor disbarred.

In 1948 Grismer as president of Extension tried to have Keane prosecuted for embezzlement of Extension funds based on Extension audit, in the Probate Court of Shoshone County, Idaho, in a preliminary hearing to determine whether or not he should be bound over to the District Court, and got the brush-off from the Prosecuting Attorney (Deft's Ex. C, 451-460, 462-463). The government in no wise backed up Grismer in this effort, but kept the basic records which it had obtained from Keane on which to put Keane behind the bars on an embezzlement charge so that it could prosecute Keane, Allen and Grismer in the federal court on the charges set forth in the indictment.

As Justice Jackson says in the Krulewitch case, *supra*:

“\* \* \* the minimum proof required to establish conspiracy is extremely low,”

and

“There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.”

That is exactly what occurred in this case; the conspiracy count enabled the government to introduce, not only Keane's direct evidence of an alleged agreement with Allen after the testimony of fifteen witnesses, but also a mass of circumstantial evidence, all of which was being put before the jury for it to surmise and speculate over, before the stellar witness for the government appeared upon the scene.

The evidence for and on behalf of defendant Allen has been thoroughly set forth in the subject of this brief entitled “The Evidence” in the Statement of the Case and will not again be discussed in detail, except to point out that the undisputed evidence established conclusively that Keane, the astute lawyer and counselor at law, who was forming lots of corporations and doing a lot of legal work (1044-1045), incorporated and organized Extension and Pilot, that he and his assistants Vermillion and Evans handled all financial and stock transactions; that all stock and financial



records for these companies were kept in his office, and according to Grismer, that is where everything was done; that Allen was not a promoter of these companies and made none of the representations in their prospectuses; that in addition to the three-way project for the deep development of Hunter Creek, Extension and Big Friday, he was vitally interested in the nucleus of the whole thing, a large, extensive, and deep development program called the Big Hunter project with the Gold Hunter as the axis, which involved a consolidation on this central development of many mining properties in that section of the Coeur d'Alene Mining District; and that the mining activity and the negotiations then going on for deep development and consolidation of mining properties in that area commencing in 1945 caused repeated rows and fights and Allen, according to attorney Johnston, was the arbitrator, administrator and conciliator (Johnston, 580-592; Grismer, 449-451; Herrick, 301-303; Allen, 1032-1036, 1047-1051, 1104-1105). It was Keane, and not Allen, who made the kick-back deals with attorneys Gyde and Johnston (Gyde, 278-279, 280-283; Pltf's Exs. 30, 31, 31a; Johnston, 545-547, 556, 576; Pltf's Ex. 8-L-1).

While the indictment repeatedly stated that the purpose of the alleged scheme or conspiracy was to defraud purchasers or prospective purchasers of stock in Extension and Pilot, thereafter referred to as investors, the government did not produce a single investor in stock of said companies to testify against Allen.



It was not contended by the government that the properties of Extension and Pilot were without merit; in fact, government counsel stated at the time Keane's plea of *nolo contendere* was before the court they had been informed that "both of these properties had merit" (Stocking, 40).

After Keane had embezzled all of the funds of Extension and Pilot, Allen was elected President of Extension, August 8, 1947 (1053), and President and Treasurer of Pilot on August 7, 1947, and re-elected to such positions of trust and responsibility following a stockholders' meeting on August 10, 1948 (1022, 1140).

The sufficiency of the evidence to convict Allen on the conspiracy count is attacked in Specifications of Errors Nos. 5, 6, 9, and 10 to 12, inclusive.

We are confident that this Court will not hold Allen responsible for the infamous crimes committed by attorney Keane while acting in a trust capacity for Extension and Pilot, who pleaded *nolo contendere* on five of the six substantive counts and on the seventh count, conspiracy, and when sentenced, walked out of the federal building a free man and practicing attorney, with a fine of only \$1,500 payable in installments and an admonition by the court not to drink intoxicating liquors for two years, a "severe" punishment indeed for committing such infamous crimes and a "shining" example as to how far a lawyer can go in embezzling trust funds without being locked up in the penitentiary.

## POINT II

Conspiracy as charged between Keane, Allen, and Grismer terminated December 26, 1946, and did not continue after that date. There were two separate conspiracies, if any at all.

Count VII charged a conspiracy between Allen, Keane and Grismer beginning at some time prior to June 1, 1945, and continuing to date of indictment (2, 10). A similar charge was made as to the same three defendants in an alleged scheme to defraud set forth in each of the other counts. No allegation is made that there was ever any conspiracy existing between two separate defendants beginning at any particular time, but that it was a continuing conspiracy between all three defendants. No allegation is made of any concert of action between Allen and Grismer. All of the six substantive counts charging a concert of action between Keane, Allen and Grismer were dismissed as to Grismer (53) and the trial resulted in Allen's acquittal of all six substantive counts (88). Keane, however, stands convicted upon his plea of *nolo contendere* of the offenses of Using the Mails to Defraud, Fraud in Sale of Securities, and Conspiracy, as charged in Counts I, II, III, IV, V, and VII (120).

Grismer testified on cross-examination that he had made the statements contained in his impromptu speech to the stockholders of Pilot at their meeting on August 7, 1948, advising them of the severance of all relations by him and Allen with Keane the latter part of December, 1946 (451-460, Appendix page 108), and that it was a truthful statement (461), and that the allegations in his affidavit sworn to February 15, 1949

(Deft's Ex. C), as to his actions in ousting Keane from Extension, December 12, 1946, and Pilot, February 16, 1947, securing audits of Pilot and Extension records in July, 1947, and having Keane arrested for embezzlement of Extension funds in 1948, at Wallace, Idaho, were very much the truth (462, 480). Such actions were taken by Allen and Grismer upon discovery of Keane's defalcations of Extension and Pilot funds, the amounts of which were later determined when the audits were made (1079-1167, 407, 456).

Following Grismer's testimony, the first objection made by defendant Allen and overruled by the court was to the introduction of Pltf's Ex. No. 48 (Spec. of Errors No. 2) during the testimony of Nolting, being checks of E. J. Gibson & Co. to cash and B. A. McLean (French) January 20 to September 26, 1947, on the ground that on the uncontroverted evidence of Grismer the exhibit could not prove any count in the indictment beginning January 20, 1947, and no concert of action alleged between Allen and Grismer. Later, after Keane testified, and Pltf's Ex. No. 48 was re-offered and readmitted on Keane's redirect examination, defendant's objection was then that Keane had testified there was no agreement between him and Allen (if there ever was one, which Allen denies) after the fall of 1946, and based further upon the testimony of Keane and Grismer that no conspiracy could then exist, so far as defendant Grismer was concerned, and further, that the transaction was an exempt one made over a year after the original offering and not claimed to be treasury stock (493-496, 769-771).

At the close of plaintiff's testimony, defendant Allen made a motion to strike from the evidence all exhibits and all testimony relating to transactions occurring after December 26, 1946, on the grounds that the evidence of plaintiff, particularly that of Keane, established that no conspiracy existed between Keane and Allen or between Allen and Grismer after that date, and that plaintiff's evidence affirmatively showed defendant Grismer was at no time a party to or participant in the alleged conspiracy, as set forth in the indictment, and on that ground the evidence was incompetent, and for the further reason that it affirmatively appeared from the testimony adduced by the government itself that Grismer could not be and was not a party to any conspiracy whatsoever at the time of the inception of any conspiracy as alleged in the indictment against Allen, Keane and Grismer, and therefore could not conspire or be a party to the conspiracy, as alleged in the indictment, with Allen after December 26, 1946, which motion the court denied (71, 935, Spec. of Errors No. 4).

Specification of Errors No. 12 (i) raised this point in errors of court in submitting the case to the jury and in entering judgment against Allen and imposing sentence on him, as the evidence was wholly insufficient to support a verdict or judgment based thereon, on ground that there was no continuing conspiracy as alleged, all relations between Allen and Keane were terminated, according to Keane, by a quarrel between them in November, 1946, by the transfer in December, 1946, of the Lexington Silver-Lead bank account by



having its directors provide who could endorse checks and by the entry of Grismer and others into Keane's office and removal of Extension books therefrom, so that said alleged conspiracy, if any, exhausted itself in December, 1946, and was supplanted by an alleged new conspiracy starting in December, 1946; in other words, there were two separate, disconnected, distinct and independent conspiracies, if any at all. See also Specification of Errors Nos. 5, 6, 10, and 11.

After Keane severed all relations with Allen and Grismer, brought about by the fact that he would not make a disclosure demanded by Allen by audits of all companies interested in Montana Leasing since 1945, which included Independence and Delaware, can it be said that the acts of Allen and Grismer in ousting Keane from Extension and Pilot, in having audits made of their records, and upon discovery of Keane's defalcations and that the treasuries of these companies were empty, taking over these companies and trying to keep them going, were acts in furtherance of an alleged continuing conspiracy between Keane, Allen, and Grismer? We believe not.

That the result of a conspiracy is continuing does not make the conspiracy a continuing one. To make a continuing conspiracy, there must be a continuity of action to produce the unlawful result.

*Fiswick v. United States* (1946), 329 U. S. 211, 67 S. Ct. 224, 91 L. ed. 196.

Continuous cooperation of the conspirators to keep it up is necessary.



*United States v. Kissell* (1910), 218 U. S. 607, 31 S. Ct. 124, 54 L. ed. 1178.

Then there is the question as to whether or not the state of facts adduced by the evidence created two separate conspiracies.

Judge Learned Hand, in the case of *United States v. Liss* (1943), 2d Cir., 137 F. 2d 995, at 998, in considering an indictment charging as a single conspiracy two separate conspiracies, which were separate both as to personnel and content, resulting in a variance between allegation and proof, said:

“\* \* \* and while that is not fatal of itself \* \* \* it is not necessarily harmless. The question is like that of joining separate crimes in separate counts of a single indictment, or of consolidating separate indictments for trial; the propriety of either depends upon the danger they create that the jury may confuse the issues; \* \* \* the fusing of the two conspiracies into one was therefore more serious against Liss and Conte—the only two of the accused who were confederates common to both conspiracies—than to Rudy or to the druggists. There was therefore a not wholly imaginary danger that the jury might use the evidence against them cumulatively to prove both charges.”

The court concluded that if the conspiracies had been separated into two counts or two indictments it would have been proper to try Liss and Conte upon both charges at the same time.

In *Marino v. United States* (1937), 9th Cir. 91 F. 2d 691, it was held that where the proof shows two conspiracies to violate federal law, in each of which some of accused participated, but in both of which all

accused did not participate, one accused cannot complain if his substantial rights are not affected.

Under the facts in the case at bar, there were two independent, separate, disconnected, and distinct conspiracies, if any at all, and the failure of the court to recognize this condition of the proof and to rule on the evidence and instruct the jury accordingly affected the substantial rights of defendant Allen throughout the trial of this action, and on the motions made after the trial.

### POINT III

Grismer had no knowledge of alleged agreement to divert funds of Extension and Pilot, as testified to by Keane, nor of diversion of funds by Keane, nor did he profit therefrom. Grismer was not a conspirator.

It is impossible to infer from the testimony adduced by the government as to Grismer's connection with the conspiracy count of the indictment that there was any criminal intent whatever on his part to defraud investors in the stock of Extension and Pilot. The joinder of Grismer as a defendant in the indictment was for the purpose of having the alleged conspiracy continue on with Allen from the time Keane withdrew in December, 1946, to the date of the indictment.

The court instructed the jury that if a person participates *knowingly* in a conspiracy for the purpose of aiding in the commission of a crime, he becomes a party thereto and is responsible just as though he was the one who originally conceived and planned the entire conspiracy (1214).

In Note 2 to the Krulewitch case, *supra*, the following observation of Judge Learned Hand was made in the case of

*United States v. Falcone* (1940), 2d Cir. 109 F. 2d 579, 581;

“\* \* \* so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided.”

The Court of Appeals for the Second Circuit reversed the judgment of conviction and its action was affirmed by the Supreme Court of the United States in *United States v. Falcone* (1940), 311 U. S. 205, 61 S. Ct. 204, 85 L. ed. 128, where in an opinion by Justice Stone it was held that the gist of the offense of criminal conspiracy, as defined by the federal statute, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy; and persons having no knowledge of the conspiracy are not conspirators, citing with approval

*United States v. Hirsch* (1879), 100 U. S. 33, 34, 25 L. ed. 539, 540;

*Weniger v. United States* (1931), 9 Cir. 47 F. 2d 692, 693;

where in the Hirsch case, *supra*, the court said:

“The combination of minds in an unlawful purpose is the foundation of the offense, and no party could be convicted on the overt act under this sec-

tion who had not joined in the previous conspiracy,”

and in the Weniger case, *supra*:

“The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified.”

In *Burkhardt v. United States* (1926), 6th Cir. 13 F. 2d 841, it was said:

“But lack of vigilance, as we have seen, is not enough; there must also be proof of knowledge of the facts, coupled with an intention to aid in the unlawful act by refraining from doing that which he was in duty bound to do. These elements cannot be inferred from inaction alone.”

“To constitute a conspiracy, the evidence must show an *intentional* participation in the attempt to commit the offense.”

*Lucadamo v. United States* (1922), 2d Cir. 280 F. 653.

The proof must show more than suspicious circumstances.

*Copeland v. United States* (1937), 5th Cir. 90 F. 2d 78.

An accused does not violate the statute prohibiting conspiracies to violate federal law, if he does not join in agreement made, even if he commits an overt act.

*Marino v. United States, supra.*

Proof of unlawful agreement and of defendant's participation therein with knowledge of agreement is essential in prosecution for conspiracy, and mere evidence of participation in offense which is the object of the conspiracy is insufficient.

*Langer v. United States* (1935), 8th Cir. 76 F. 2d 817.

The evidence in fact must show something further than merely participating in the offense which is the object of the conspiracy, and such participation by Grismer is susceptible of a construction consistent with his innocence. The evidence was unconflicting as to Grismer, and was that of the government alone. Irrespective of Grismer's plea of *nolo contendere* to the conspiracy count, for the purposes of this trial the government established his innocence of the conspiracy count and conclusively showed that he was used as a cat's paw, not by Allen or Keane, but by the government, in order to gain a procedural advantage in this trial. As a consequence, there could be no conspiracy, if any, continuing after December 26, 1946, and the court erred in refusing to strike all exhibits and all evidence relating to transactions occurring after December 26, 1946.

Justice Jackson in the *Krulewitch* case, *supra*, says that the crime of conspiracy

“\* \* \* is always ‘predominantly mental in composition’ because it consists primarily of a meeting of minds and an intent.”

The record established by the government as to Grismer is silent as to any meeting of minds between Keane, Allen and Grismer to commit any crime whatever, and there was no fraudulent intent on his part in connection with his acts and deeds in association with Keane or Allen in the organization and promotion of Exten-



sion and Pilot. Every act of Grismer showed a sincerity and honesty of purpose.

#### POINT IV

Certain instructions originally given were erroneous. Action of court in giving second set of instructions during deliberations of jury was reversible error.

The court told the jury in effect that the testimony of Keane and Grismer was not necessary to the government's case against Allen, providing the jury was convinced beyond all reasonable doubt of his guilt from the other testimony in the case (1229-1230), to which defendant excepted that there was no sufficient direct evidence to establish the elements of the conspiracy charged without the use of the testimony of Keane and Grismer and that to find the elements of that conspiracy by circumstantial evidence the jury should have been advised that such circumstantial evidence to establish that element must be consistent with one hypothesis or theory, guilt beyond a reasonable doubt, and cannot be consistent with innocence (Spec. of Errors No. 7(b), 1244).

Lawyer Keane, who furnished the government with the evidence and assisted in the preparation of this case, gave direct evidence of the scheme to defraud and the conspiracy as charged, admitting that he had diverted the funds of Pilot and Extension pursuant to an alleged agreement with Allen with whom he claimed to be in some kind of a partnership. All of the other testimony in the case was circumstantial, including the testimony of Grismer.

We are aware of the fact that a federal judge is vested with considerable discretion in commenting on the facts before the jury and in reviewing the evidence, provided he does so fairly and presents both sides of the case.

*Boyett v. United States* (1931), 5th Cir. 48 F. 2d 482.

But by such an instruction the court was emphasizing and bolstering the circumstantial evidence far beyond its actual weight and importance and deprecating the importance and force of the direct testimony and thus invading the province of the jury in determining the weight and value to be given all of the evidence necessary to prove the government's case, greatly to the prejudice of the defendant Allen.

We are at a loss to understand why the trial judge was suggesting to the jury that Keane's evidence could be entirely eliminated and yet the jury could convict Allen on all the other testimony. The government thought enough of Keane's evidence, notwithstanding it was interspersed with pleas of intoxication when his memory was being tested by defense counsel, by recalling him to the witness stand for rebuttal and dragging in his wife in an effort to corroborate her husband's testimony as to what occurred when Allen visited their home in the fall of 1946. It is also true that an important piece of testimony is missing in Keane's testimony. Why did not the government introduce Keane's bank account, his bank statements, and his cancelled checks?

Counsel for the government knew that Keane's testimony was the only nail upon which the jury could possibly hang a verdict of guilty in this case. Every act of Keane from the beginning of the investigation by the SEC of the affairs of Extension and Pilot leading up to the indictment of defendants in this case, his equity suit at Wallace against Allen, Grismer and others to secure an accounting and receivership, the proceedings on his offer to plead *nolo contendere* to the indictment before Judge Driver, his part in Allen's trial, and the proceedings on the sentencing of Keane and Grismer before Judge Driver, points to a three-fold purpose, to-wit: to escape being sent to the penitentiary at all costs, to avert disbarment by the Idaho State Bar, and to send Allen to the penitentiary. This goal was before him at all times. Was not the reward impliedly held out to Keane by the government for his testimony in this case of such transcendent importance to him that he would go the limit to testify for the government, regardless of the truth? Would such a ridiculous proposition have been made by Allen to Keane prior to the organization of the Extension in 1945 to which Keane testified that Allen and Keane divert the proceeds from the public offering of Extension stock in order to bail themselves out when in fact it was conclusively shown by the records themselves so far as Allen knew at that time that there was no necessity so to do? Keane's habitual intoxication, too, was a subterfuge and a snare to avoid the element of fraudulent intent in securing acceptance of his plea of *nolo contendere* and to be used by him on the witness stand to

ward off pressing cross-examination testing his memory by not being able to remember facts that might prove favorable to Allen's defense. Keane's close friendship for Allen (147) ceased in December, 1946, when Allen demanded that he make a complete disclosure, and the bitterness between them since that time was repeatedly shown by Keane on the witness stand.

Whenever what is called an accomplice or an informer turns what is called State's evidence, and whenever he is permitted by the court to be sworn as a witness in a case, there is then upon the part of the government an implied promise that if he tells the truth, he shall not be punished.

*United States v. Ford* (1879), 9 Otto 594, 25 L. ed. 399, at 401.

No doubt Keane's testimony proved most satisfactory to the government on account of what later proved to be an extremely light sentence for his crimes. Keane understood perfectly that the more damaging evidence he gave against Allen, and the more embellishment he could give it the better were his chances to escape incarceration in the penitentiary and disbarment as an attorney. He knew perfectly well that the government would not complain of any falsehood he might swear to against Allen. There is but one excuse for using the testimony of a man who enters a plea of guilty (or *nolo contendere*, which has the same effect) and that is that without his testimony a conviction cannot, in all probability, be obtained. Whenever such a man



is put on the witness stand, that of itself amounts to a promise of immunity.

In *People v. Whipple* (1827) (New York-Cases in the Circuit Courts, and Oyer and Terminer), 19 New York Common Law Reports, no page number, 9 Cowen 708, @ 709, 710 and 711, the court said:

“The evidence of accomplices has at all times been admitted, either from principle of public policy, or from judicial necessity, or from both. They are no doubt requisite as witnesses in particular cases; but it has been well observed that in a regular system of administrative justice, they are liable to great objections. ‘The law,’ says one of the ablest and most useful modern writers upon criminal jurisprudence, ‘confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate.’ ”

In *United States v. Lee* (1846), 4 *MacLean* 103, 26 Federal Cases No. 15, 588, page 910, the court said:

“An accomplice is used by the government because his evidence is necessary to a conviction.”

Both the district attorney and his associate counsel for the government, Stocking, showed on the hearing of Keane’s application to change his plea of not guilty to *nolo contendere* six months before the trial of Allen, that they had given careful consideration to the matters which Keane’s evidence would cover if called as a witness for the government, including the docu-



mentary evidence which could only be admitted through his testimony, and it was then determined that his testimony was vital to establish a case against Allen or Grismer by proof beyond a reasonable doubt, if either should go to trial, as at that time the case was pending against them on pleas of not guilty (34-42).

So we have here the anomolous situation of government counsel in effect certifying to the trial judge that the testimony of Keane was necessary to the government's case in order to convict Allen and the court exercising his sound legal discretion in permitting Keane to testify under an implied promise of leniency if he testified fully and fairly, because his testimony was necessary to secure Allen's conviction, and then the court instructing the jury after the completion of the testimony that the testimony of neither Keane nor Grismer was necessary to the government's case against defendant Allen, provided the jury was convinced beyond all reasonable doubt of the guilt of defendant Allen from the other testimony (1229-1230), and defendant's counsel excepting to that instruction (1244) and no correction being made thereto by the court (1245-1249).

Keane understood as a lawyer from the beginning that, by turning over to the government the necessary documentary evidence, by assisting the government in the preparation of this case for trial, and by becoming a witness and testifying for the government, against his former friend Allen, he could expect to receive mitigation of punishment or other favorable treatment. If

Keane's testimony was not absolutely necessary to the government to secure a conviction of Allen and by means of which thirty-one government exhibits were admitted in evidence, then why in the name of Heaven did the government without regard to any sense of decency and propriety whatever, subject Keane, a fairly prominent lawyer, to the mental suffering, the chagrin and embarrassment which he suffered by publicly admitting under oath the crimes of embezzlement, mail fraud, violation of the national securities act and conspiracy to violate the laws of the United States, in violation of his oath upon admission to practice in the State of Idaho that he would support the Constitution and Laws of the United States and of the State of Idaho, and to the adverse newspaper reports that followed his testimony, with headlines such as "Keane Testifies of 'Heavy' Drinking," "Diet of Whiskey Told by Keane," and "Keane's Drinking Not Worse in '45 Than Now, Allen Says"?

Keane's testimony was absolutely necessary to convict Allen and none knew it better than government counsel. The court's instruction that the testimony of Keane and Grismer was not necessary to convict Allen was erroneous, of material prejudice to defendant Allen, and requires a reversal. If, for instance, the jury had been given the right to determine for themselves whether or not the evidence of Keane (or Grismer) was necessary to convict Allen, but because of his testimony that he gave claiming habitual use of intoxicating liquor to a degree that he only had moments of sanity thus affecting his credibility to such an extent that

none of his testimony could be believed and that if it therefore raised doubt in the jury's mind that the government had not proved its case beyond a reasonable doubt, Allen should be acquitted on all counts of the indictment, Allen undoubtedly would have received complete exoneration at the hands of the jury. Notwithstanding the instruction as given, Allen was acquitted of all substantive counts; if that instruction had been omitted, we firmly believe that twelve honest men and women would never have convicted Allen of the conspiracy count upon the evidence of a man like Keane.

---

The action of the court occurring while the jury was deliberating on its verdict and had been doing so for more than twenty-four hours materially prejudiced the defense of defendant Allen, was an abuse of the court's judicial discretion at a time where the most extreme care and caution were necessary in order that the legal rights of defendant should be preserved, and affected the substantial rights of defendant. The matter is fully stated in Specification of Errors No. 8. After giving lengthy and complex instructions to the jury at the close of all the testimony, to which defendant excepted, and after sixteen hours of deliberation by the jury and no agreement had been reached and after the court submitted to counsel a set of further instructions which he wished to give the jury, to which defendant's counsel strenuously objected, and after the court agreed not to give further instructions, unless the jury re-

requested additional instructions, the jury voluntarily returned into court after deliberating, as stated, for more than twenty-four hours and did not indicate confusion as to the law, nor the need for further instructions, but asked a simple question requiring a simple answer. Thereupon the court, assuming there were two problems troubling the jury, proceeded to and did give the jury a copious and complex set of instructions which served only to further perplex and confuse the jury, which were not of aid to the jury, and minimized the force and effect of the first set of instructions, to which defendant's counsel excepted.

In jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury, and they furnish ground for reversal, unless it affirmatively appears that they were harmless.

*Fillippon v. Albion Vein Slate Co.* (1919), 250 U. S. 76, 39 S. Ct. 435, 63 L. ed. 853.

The court may recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties.

*Allis v. United States* (1894), 155 U. S. 117, 15 S. Ct. 36, 39, L. ed. 91.

In the case of *Burton v. United States* (1905), 196 U. S. 283, 49 L. ed. 482, where the jury, after long deliberations without an agreement, returned to report their inability to agree, and defendant's counsel



again urged the giving of defendant's requested instructions and the court's refusal was held reversible error. The court said:

"Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours, and been unable to agree upon a verdict. \* \* \*. Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. \* \* \*. A slight thing may have turned the balance against the accused under the circumstances shown by the record \* \* \*."

The court in the case at bar had instructed the jury in the first instance that it was not necessary for the government to prove every allegation in the first paragraph of Count I but only one or more of the essential elements of the scheme to defraud or conspiracy as charged (1205). The jury did not ask for further instructions on this or any other point than an answer to a simple question, but the court assumed that this point was troubling them and gave the same charge again in the second set of instructions (1275).

This was a singling out and the giving of undue prominence to this particular issue, a repetition of one phase of the case, and such prominence given on that particular point was sufficient to prejudice the defendant by inducing the jury to believe that the issue presented was the controlling one.

5 C. J. S. "*Appeal and Error*," Secs. 1768-1769, page 1136.



Further, the additional instructions were of such a nature as to add to the jury's doubt and confusion and to require reversal.

5 C. J. S. "*Appeal and Error*," Secs. 1763(e), 1783(a).

The action of the trial court in the giving of additional, copious, complex, conflicting, contradictory, and misleading instructions, in addition to those already given which were copious, complex and misleading, and erroneous in some respects, after more than twenty-four hours of deliberation by the jury, was reversible error and affected seriously the substantial rights of defendant. After hearing the additional set of instructions at about 8 P. M. on Saturday night, the jury did not return a verdict until 10:35 A. M. Sunday morning (1277, 1282).

#### POINT V

Verdict of acquittal of Allen of all substantive counts of indictment and conviction of conspiracy count is not only inherently inconsistent and repugnant and lacks sufficient evidence to support it, but conspiracy count is improperly included in indictment.

Specification of Errors No. 10 relating to the error of the court in denying the motion of defendant Allen that the verdict of guilty returned by the jury against him on Count VII of the indictment, the conspiracy count, be arrested and that no judgment and sentence be imposed thereon and Specification of Errors No. 11 relating to the error of the court in denying a motion of defendant to have the court order a verdict of not guilty as to him on said Count VII or for a new trial as to said count will be discussed together (88,

91, 1285). These two motions are directed at the sufficiency of the evidence to prove a conspiracy against Allen or a criminal intent or either separate or joint and concerted criminal action on his part or to connect him in any manner with the crime set out in Count VII, and also against the verdict of the jury finding Allen guilty of Count VII, the conspiracy count, and the argument is based on what appears to be an interplay of legal principles arising from the fact that the verdict is not only inherently inconsistent and repugnant, but the state of the record in relation to the indictment lacks sufficient evidence upon which to sustain a conviction on the conspiracy count and the Supreme Court of the United States has indicated in decisive language and in no uncertain terms the legal principles and benefits of doubt that should be given to the position of defendant and the situation which obtains in this case. The situation presented by reason of Allen's acquittal on the six substantive counts and his conviction on the conspiracy count presents a weighty proposition for determination. This is so in view of the all-inclusive facts pleaded in all the counts, which are not conducive to an appropriate and intelligent separation of argument addressed to independent and exclusive propositions of inconsistency, lack of evidence, or improper inclusion of the conspiracy count. There are numerous cases treating of the problem of inconsistency alone; there also are cases which alone treat of the question of sufficiency or insufficiency of evidence to sustain conviction; and there are also cases which, excluding any consideration of the two propo-

sitions mentioned, bottom their argument upon the criticism of the conspiracy dilemma.

The court told the jury as to what were the essential elements of the scheme to defraud or conspiracy, as alleged in the first paragraph of Count I of the indictment and realleged by reference in every other of the six remaining counts (1234-1235, 1237), so, eliminating for the sake of brevity the non-essential elements of the crimes charged to defendants, the indictment alleged in every count in substance that defendants Allen, Keane, and Grismer knowingly, wilfully, and intentionally devised, joined, or participated in a scheme to defraud purchasers or prospective purchasers of stock of Extension and Pilot and to obtain money and property by means of false and fraudulent pretenses, representations, and promises for the purpose of doing these essential elements of the scheme to defraud:

1. By concealing the fact that Allen was a promoter of said companies and was to receive any part of the stock to be taken by defendants;

2. By representing to investors in stock of said companies that the proceeds from the sale of said stock would be used by said companies for the exploration and development of their mining properties in Shoshone County, Idaho, well knowing that such proceeds were not to be so used and that a portion of the moneys due said corporations from the sale of their treasury stock would be appropriated and diverted from said companies to their own use and benefit and that it was so appropriated and diverted;

3. By intending and agreeing that certain stock in said companies would be given to attorneys as attorney's fees, but that actually a part of it would and did come back to the defendants as promoters for the purpose of defrauding the public (2, 1234-1235, 1237).

The first three counts of mail fraud alleged in effect that defendants, for the purpose of executing said scheme, did knowingly cause to be delivered by United States mail, a certain letter (5).

Likewise, as to Counts IV, V, and VI, it was alleged that defendants caused to be delivered by United States mail certain letters, all of which acts were against the peace and dignity of the United States and contrary to the form of the statute (7-10).

In Count VII it was alleged in substance that defendants conspired, combined, confederated and agreed with each other and with divers other persons unknown to the grand jury to commit the following crimes and offenses against the United States: violations of mail fraud statute and two sections of the National Securities Act, by using the United States mails and means and instruments of transportation and communication in interstate commerce, for the purpose of executing the device, scheme and artifice to defraud described in paragraph 1 of the first count of the indictment, which paragraph is here and now realleged.

That the government intended and contended that the same scheme was jointly intended and executed by all of the defendants, including Allen, is indicated by the statement of the district attorney to the court, when



the jury asked their question hereinbefore referred to, that the court should instruct the jury that the scheme is set forth in Count I in detail and defines what that scheme is again in as short and concise language as possible and then state that the *other counts incorporate that same scheme by reference* and that the various other respective counts *charge that the same scheme was used as Count I*, to mail letters on the other dates mentioned in the *other respective counts* (1266).

What has been the result of the verdict of the jury in view of the above? The jury has held by its verdict on the substantive offenses charged, that the defendant Allen did not singly, or jointly and in concert with the other two defendants, commit any of the crimes charged in Counts I, II, III, IV, V, and VI. Likewise, the verdict of the jury has the effect, as to Counts I to VI, inclusive, of holding that Allen was not singly, or jointly and in concert with the other two defendants, guilty of committing any of the so-called false and fraudulent pretenses, representations and promises, or of participating in such *scheme*, and it is pertinent to observe that in pleading the false and fraudulent pretenses, representations and promises the government pleaded the entire evidence structure of its case as to each and every count in the indictment including Count VII. It seems absolutely clear that the lengthy and detailed pleading of the acts alleged to have been committed, in view of the government's theory, was intended by the government to encompass all of the direct and circumstantial proof upon which the govern-



ment relied to prove each count in the indictment herein. Likewise, it is most pertinent to note that the indictment alleges as to the alleged commission of crimes that "prior to June 1, 1945, and continuing to the date of this indictment," etc. In other words, the government supports Count VII upon precisely the same alleged evidence, the same circumstances, the same allegations, covering the same time that it bases its allegations of *joint scheming and defrauding, etc.*, which it sets up in the substantive counts of the indictment. A careful examination of the specific acts of false and fraudulent pretenses alleged to have been committed in Counts I to VI is the clearest and most absolute proof that no fact, or circumstance set out in Count VII is excluded from the all-inclusive and detailed charges of joint and concerted action alleged in Counts I to VI. An examination of Count VII indicates its absolute dependence and complete reliance on the same specific allegations and evidence as was employed to support those counts numbered I to VI.

In view of the language used in all the counts in the indictment, and, furthermore, in view of the theory of the government as indicated by its contention respecting what it contends are necessary elements of evidence, it seems unquestioned that the government was and is of the opinion that the essential elements of each count were those which were pleaded in Count I and throughout Counts II to VI and which were specifically included by reference in Count VII. The elements of the offenses so far as the evidence, the alle-

gations pleaded, and the theory of the government was concerned, were identical as to each count. We are therefore convinced that the lengthy and detailed specific allegations in the indictment which sought to prove the defendant Allen guilty of the specific crimes charged in each count were the self-same necessary elements as to each count.

The jury found that the essential elements upon which the government depended, and for which it contended, and which it pleaded in Counts I to VI were not proved; and any contrary finding in Count VII concerning the self-same necessary elements of proof and covering the self-same time involved is not only inconsistent but necessarily repugnant. Such a conviction if allowed to stand in view of the present mind of the Supreme Court of the United States would seem abhorrent to the right of the defendant to receive a fair trial, and fair treatment consistent with the principles of our system of justice. As Justice Jackson, in the *Krulewitch* case *supra*, said:

“This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the ‘tendency of a principle to expand itself to the limit of its logic.’ The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.”

A determination of the issues here must depend upon the interplay of principles of law which arise from a combination here of inconsistency in the verdict, lack of legal and proper evidence, and the relation of those omissions to the approach to the conspiracy statute indicated in the above quotation and opinion.

In order to ascertain properly the full sweep of our contention we shall first discuss the question of inconsistency in the verdict without contending that such inconsistency, in all circumstances and in all particulars and standing alone, would be sufficient under the federal decisions to warrant the court in granting the motion for acquittal as to Count VII. For some time there was decided conflict in the Federal Courts with reference to the validity of an inconsistent verdict.

Prior to the decision in 1932 of the Supreme Court of the United States in

*Dunn v. United States*, 284 U. S. 390, 52 S. Ct. 189, 76 L. ed. 356, 80 A. L. R. 171, on *certiorari* from the 9th Cir. 50 F. 2d 779,

the Court of Appeals for the 3d, 8th and 9th Circuits had held that a conviction would not stand which was inconsistent, and unless the verdict of guilty was supported by substantial evidence other than that evidence which was offered in support of the counts on which the acquittal had been had.

Justice Butler, in his dissent in the *Dunn* case, *supra*, considered in a very scholarly opinion the matter of inconsistent verdicts and his reconciliation of the prob-

lem, and stated that in criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction, citing

2 *Bishop*, New Criminal Procedure, 2d Ed. Sec. 1015a(5)

and concluded as follows:

“I am of opinion that the authorities established as well-settled: (1) that when, upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other defendant is entitled to new trial; and (2) that, when different crimes are charged in separate counts and the jury acquits as to one and convicts on the other, the conviction will be sustained unless, excluding the facts which the jury in reaching its verdict of acquittal necessarily found not proved, it must be held as a matter of law that there is not sufficient evidence to warrant the verdict of guilty; and, where the evidence outside the facts so conclusively negatived by the acquittal on one count is not sufficient to sustain guilt on the other count, defendant is entitled to a new trial.”

The statement of Justice Butler would indicate that the present verdict on Count VII would certainly be inconsistent in itself because of the allegations pleaded in Count VII and found not proved in Counts I to VI and in any event the verdict would certainly lack sufficient evidence upon which to sustain the conviction.

To hold as consistent and not repugnant a verdict of acquittal on all substantive counts of indictment as against conviction on conspiracy count on the same and identical evidence on which defendant was acquitted where the elements of the alleged scheme to

defraud were the same as the elements of the alleged conspiracy is neither common sense nor rational. Such a verdict and judgment of conviction and commitment of Allen thereon was in violation of the Fifth Amendment to the Constitution of the United States and deprived him of a fair trial and the fair treatment to which he was entitled under our American system of justice.

## POINT VI

Conspiracy conviction of Allen should not be upheld where prosecution for substantive offenses was adequate and purposes served by adding conspiracy charge was to get procedural advantages over defendant to ease way to his conviction.

We have heretofore pointed out under Point I of Argument the statement of Justice Jackson in the *Krulewitch* case, *supra*, that statutes authorize prosecution for substantive crimes without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges; that there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offenses is adequate; and that the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

Justice Jackson cites in footnote 2 from the Conference of Senior Circuit Judges presided over by Chief Justice Taft in 1925 as follows:

“\* \* \* the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant.”



Justice Jackson observes that the basic conspiracy principle has some place in modern criminal law, because, to unite back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer, and

“It also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade \* \* \* and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law.”

In the case at bar an administrative branch of the government commonly called the SEC was prosecuting in the name of the United States only three defendants on the theory that they had joined in a scheme to defraud in violation of the mail fraud statute and the National Securities Act and had, in addition, conspired to violate those statutes—a case of covering over charges of the commission of specific crimes with an “elastic, sprawling, and pervasive offense” of conspiracy to commit the specific crimes, which required an extremely low minimum of proof to establish, permitted the loose application of rules of evidence and creating an especially difficult situation for the defendant.

The Court has itself considered this problem in *Von Moltke v. Gillies* (1948), 332 U. S. 708, 68 S. Ct. 316, 92 L. ed. 309. The separate opinion of Mr. Justice Frankfurter, concurred in by Mr. Justice Jackson, contains this striking comment on criminal conspiracy:

“But it would be very rare, indeed, even for an extremely intelligent layman to have the understanding necessary to decide what course was best calculated to serve her interests when charged with participation in a conspiracy. The too easy abuses to which a charge of conspiracy may be put have occasioned weighty animadversion by the Conference of Senior Circuit Judges. \* \* \* The subtleties of refined distinctions to which a charge of conspiracy may give rise are reflected in this Court’s decisions. See e.g., *Kooteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. ed. 1557. Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes. Thus, as may have been true of petitioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses.”

Likewise, Justice Jackson in the Krulewitch case, referred to an article in 62 Harvard Law Review, December, 1948, page 276, which is likewise of great interest in its discussion of conspiracy. It is entitled, “*The Conspiracy Dilemma Prosecution of Group Crime or Protection of Individual Defendants.*” The article itself is a noteworthy discussion of the conspiracy weapon: it quotes the use of the conspiracy statute, and refers to its description by Judge Learned Hand in *Harrison v. United States* (1925) 2d. Cir., 7 F. 2d 259, 263, as the “*darling of the modern prosecutor’s nursery.*”

The Krulewitch case, *supra*, to which reference has

been made, contains in a concurring opinion of Justices Jackson, Frankfurter and Murphy a very able discussion of the law of conspiracy as it relates to the matters now before this court. It is truly a situation described by Justice Jackson when he said:

“A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate.”

Likewise, it should be remembered that, “*a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime.*”

*Terry v. United States* (1925), 9th Cir., 7 F. 2d 28, 30.

The logical elimination of facts not proved combined with the “scatter gun” conspiracy charge, would have resulted in a complete verdict of acquittal. We submit that the statement of Justice Jackson should be kept in mind in a consideration of the many problems involved in this case, and that this court should not strain, in view of the record and the acquittal by this jury of the defendant Allen on six counts, to uphold the conspiracy conviction on the conspiracy count in issue here.

## CONCLUSION

Because of the rulings of the court which we believe to be erroneous and the verdict of the jury convicting Allen of conspiracy and acquitting him of the substantive counts and for the reasons stated, reversible error affecting the substantial rights of defendant Allen has occurred, and we, therefore, submit that the judgment of conviction and commitment of defendant and appellant Allen should be reversed.

Respectfully submitted,

R. MAX ETTER,  
WILLIAM E. CULLEN,  
THERRETT TOWLES,  
J. F. EMIGH,  
JAMES A. MURRAY, JR.,

*Attorneys for Defendant and  
Appellant,*

JAMES ANTHONY ALLEN.

## APPENDIX

**Mail Fraud Statute**

The pertinent portion of Title 18 U. S. C. A., Section 338, is as follows:

Sec. 338 (Criminal Code, section 215.) Using Mails to Promote Frauds; \* \* \* Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, \* \* \* shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both.

**National Securities Act**

Title 15 U. S. C. A., Section 77e, is as follows:



Sec. 77e. Prohibitions Relating to Interstate Commerce and the Mails.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this subchapter, unless such prospectus meets the requirements of section 77j; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 77j.

Title 15 U. S. C. A., Section 77q, is as follows:

Sec. 77q. Fraudulent Interstate Transactions.

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c shall not apply to the provisions of this section.

### Conspiracy Statute

Title 18 U. S. C. A., Section 88, is as follows:

Sec. 88. (Criminal Code, section 37.) Conspiring to Commit Offense Against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

### Impromptu Statement Made By Defendant Grismer at Stockholders' Meeting of Pilot on August 7, 1948

Q. \* \* \* Do you recall a stockholders' meeting of the Pilot Silver Lead held on August 7, 1948, in the assembly room of the Old National Bank Building, at 7:30 P. M.?

A. Yes.

Q. Do you remember being there?

A. Yes, golly yes.

Q. I want to read a statement that you made there and ask you if you made that. "Mr. Grismer: I don't believe I need any introduction to the Pilot because I was the original locator of the Pilot Mine, together with Bill Walker, in 1924. We packed up there the picks and drills and made the property what it is today. We of course were common guys and a long way

from knowing exactly how to handle things, but we finally ended up in incorporating the Pilot, and you might say promoting it. Very well. A good many people here bought stock on my reputation. I had a good mining reputation at that time. I haven't got quite as good now. Anyway, we turned this over to that Board of Directors, the first Board, with the full intention and hopes that they would—well, figuring they would play fair with everyone. I went on as manager of the property. I am a little ahead of the game. Mr. Bentley cites figures that are supposed to be since October, 1945, to June, 1947. It took so long to get a certain amount of money. The company was not incorporated until January, 1946, and in June, 1946, the company was fully financed. Not a dollar has come in since. A lot of it went out. In August I started operation as manager of the property at a rate supposed to be at \$200.00 a month. September came around. I was not paid. I didn't care a heck of a lot. I thought I would let things run as long as we were going to make a mine out of it, and I found that a lot of bills were not paid. I then tried to enter the office of F. C. Keane, who was president and the whole cheese, you might say, of the Pilot." Did you say that?

A. That was after the incorporation.

Q. "He and his secretary, Glynn D. Evans, were the officers and directors of the Pilot. I couldn't contact Mr. Keane. He was always in the habit of running away when I came near and cutting me off: 'Well, I will take care of it tomorrow,' and he called me pretty

fancy names now and then, which was quite characteristic of him, and I told him that these bills had to be paid. 'Well, how in hell do I know they are legitimate bills?' That is some more petty-fogging, I guess. I told him, 'Any time I send a bill, it is a legitimate bill. I wouldn't send it if it wasn't.' I said, 'If those bills are not paid next month, I will take action.' November came around and I was not paid as manager, and I am not paid to this day. December 10th came around and the bills were still not paid. I couldn't do anything with Pilot. I was not an officer. I was not a director of the Pilot. But prior to that, in the office of F. C. Keane, the only one I could contact was Mrs. Vermillion, and I was just trying my hardest to get things moving, and in the course of our conversation she once said, 'The bank deposits are in terrible shape.' That was enough for me to take action. As I said a minute ago, I couldn't take any action on the Pilot, but I was President of the Lucky Friday Extension, which was also in the hands of F. C. Keane."

A. That's right.

Q. "Well, people say, 'Why in heck did you trust him?' I will tell you why. He was attorney for the Independence; he was president of the Independence Lead; he was attorney for the Clayton. They trusted him; why in hell shouldn't I? That is my answer, and I say, unfortunately. On December 12, after seeing that the bills were not paid on the Pilot, I thought there was something radically wrong. I called a meeting of the Board of Directors of the Lucky Friday



Extension, and that meeting was called at five o'clock because one of the members of the Board was working and was working overtime. At that meeting I told the Board the situation of things in the Pilot, and I told them that I just couldn't come to any agreement. I said, 'I can't get any statements, can't get nothing from Keane, as to the Lucky Friday or the Pilot,' and I said, 'I personally think there is something radically wrong and I will entertain a motion that F. C. Keane be discharged from the service of the Lucky Friday Extension as attorney for the Company and that his name be stricken from the bank,' and that motion was made and carried.'" Do you remember saying that?

A. Yes, certainly.

Q. "Then the next motion was made and carried that the office be moved from its present location, which was in Mr. Keane's office, and I designated my own office as the office of the Lucky Friday Extension. That was carried. Then we were to move the books over immediately. Well, we went in and the then secretary, Glynn Evans, he showed us where some of the books were. All we got then was a stock ledger and a stockholders' list and the seal. The rest was in the safe. We would not enter the safe, and that is all we moved over that night, but we had enough. We were in business, anyway. I put them in my office under lock and key. That night my good friend called me and called me a nice pet name. He said, 'You so and so, you burglarized my office,' and he said, 'You better have that stuff back by nine o'clock in the morning or

I am going to have you arrested.' I told him, 'Well, I don't like that name connected with me, nor do I like the name burglars.' 'But,' I said, 'rest assured, Big Shot, there will be nothing back, and I will be there at eight o'clock waiting for you to arrest me.' " That's Keane you're talking about?

A. Yes, sir.

Q. " 'Go to it.' But he wasn't there, and I never was arrested, not to this day, anyhow. Well, we started business. That is all we ever got out of that office, was the stock record and the stock register and the seal. To this day we haven't got a cancelled check of any kind there. He finally did send over a copy of the by-laws, a few little things like that that didn't matter any. Then I shut down the Pilot when I saw how things were and I could get no action, and I proposed, and my lawyer will testify, 'If you get one lawyer to sue another you are a genius.' Anyhow, I couldn't get to his office until about the first of February. I figured he would be at his office. I called the SEC and they got after him, and after a little course of time I believe Denney got the condition of things, and he said there was about thirty-seven dollars or something in the bank.

"To this day we have no records of the company pertaining to the affairs of this company up to January 1, 1947, at the time all of this money disappeared. Not only did the Pilot money disappear but the Lucky Friday money disappeared. So I hired Mr. Wayne, who unfortunately now is dead, as my attorney to try and

get this thing going and get the records and so on, and he always threatened to start suit or one thing or another. And finally, we decided to run a bluff on him. That is when I called Mr. Allen in to help, because he knew Keane better than I did and perhaps could do something. I told him the situation. I said, 'Can you do something?' He said, 'I will go ahead and try.' He got interested and kept trying one way or another, which finally ended up—between Mr. Wayne and Mr. Allen they got the idea they were going to call a stockholders' meeting, and they threatened Keane with that, that either he resign and appoint a new board or his whole board would be removed, and that we would call a meeting and expose him and we would appoint a new board anyway, and that is what induced Keane to resign. But, as I say, we never got any records of any kind of the twenty-five dollars in the kitty.

“Sure, I say, there were creditors coming in. They were trying to foreclose on those different things, and that is how Mr. Wayne kept them off. He kept them quite a period of time, until such a time as this trusteeship was worked out. I gave pretty near all of my stock that I got for payment of my company into that trustee account to make these companies whole, for the simple reason, hadn't I done it I would have lost and all of my friends would have lost. As I see it, my friends have a chance to save their stock, because a receiver would have been appointed. Otherwise, everything would have been lost. But between my friends and Mr. Allen, we saved this stock by putting this stock in the hands of trustees to make this company

whole, and in the meantime start work to get some new action on there, and finally got associated with Lead and Zinc Syndicate Company, and my thanks for my efforts, after owning that property and making it what it is, owning it for twenty-eight years and giving up my stock, is a good swift kick, a letter sent out to the public telling what a low down so and so am I, and the public will fall for it, and that is the reason for mostly all of this business here tonight. Our efforts, as I said, after giving up all of these properties—what do we get out of it? That is why Mr. Allen is here. I asked him in. I hope that answers the question.” Did you make that speech at a stockholders’ meeting?

A. Pretty much that way.

\* \* \* \* \*

Q. Likewise at the stockholders’ meeting, Mr. Grismer, do you recall making the following further statement: “I can tell you that during my ownership, including Mr. Walker back there, there was about \$40,000 spent on it. There was in the neighborhood of 2,200 feet of work on it. A great deal of that was done by myself by hand work, and if you know what a mine is you know what hand work is. You know that is not child’s play. I spent thousands of dollars of my own money to bring the property to what it is, and ninety per cent of the stockholders here now have more stock than I have, and as to what became of the money, to this day we haven’t been able to get any records as to what happened to anything. F. C. Keane kept them there and it is now under subpoena of the SEC and



we can't get it. We have made repeated efforts, asked the SEC to turn those over to different parties. We always get a run-around, and no one has ever been able to find the exact amount of money that went any particular place, but it went out without the knowledge or consent of any of the Board of Directors." You made that statement?

A. That's right.

Q. And this one too, answering a question: "Mr. Grismer: Yes. Have you the report on the Pilot? I prepared charges against F. C. Keane and that time I knew—I could see that it was going to be a white-wash, and Mr. Bentley will testify to the fact, I got about two hours' notice to appear. I got a subpoena, and I came off the job and appeared at one o'clock at the courthouse for the hearing—no, not the hearing; it was merely regarding the plea. I called up the prosecutor, I said, 'Now, just what is the nature of this thing?' 'Oh,' he said, 'we will just gather and set the bond,' and I said, 'That is all there is to it? There will be no hearing?' 'Oh, no, no. There will be no hearing. Of course, he can demand a hearing.' I knew darn well by the tenor of his conversation that already the case had been settled. I got on the phone and called Mr. Bentley and asked him to come down and asked him to witness the whitewash of F. C. Keane. Isn't that the words I told you?" Did you make that statement?

A. That is right.

Q. And this, further: "You asked the question



awhile ago—I based this complaint, due to the fact that I couldn't get any books or anything. We did succeed in having a certified public accountant by the name of Mr. Randall, with the permission of the SEC, to go and make an audit of some of the records that the SEC had, and I based my complaint on the findings of the auditor, of a certified public accountant, who had access to the books and records that were denied me, and it was on that basis that I entered this complaint, and that is certain. When I got on the stand I told him that I based my complaint on this audit on the findings of a certified public accountant when the books and records were denied me. But our great prosecuting attorney down there didn't see fit to dignify the oath of a certified public accountant and bring them into his office because it would have convicted Keane, and that is the Probate Court of Shoshone County." Did you say that?

A. I did.

Q. In that conversation when you were referring to "we," you were referring in part to Mr. Allen?

A. In which?

Q. When "we went down and got the records" and "we got after him"?

A. Yes, Mr. Allen was very much interested in that and active in that, yes. (451-460.)

#### FIRST SET OF INSTRUCTIONS

Court's Instructions to Jury at Close of All the Testimony.

The Court: Members of the jury, you've heard the

evidence in this case and the argument of counsel on both sides. You've now reached that state in the trial where it's my duty to instruct you as to the law, and it's your duty to listen carefully to the instructions that I give you.

In Federal Court the instructions are what are known as oral, that is, they're oral to you. You will receive no copy of what I say. They're oral to counsel; they likewise only know actually what the instructions are when they hear them spoken. They may be oral or written as far as I'm concerned. Frequently the instructions I give are entirely oral. While I think the language is not so excellent, I've sometimes thought that people understand better what's spoken than what is read. In some cases I give the instructions entirely from writing. In other cases, as you will find in this case, I combine some speaking, as I am now doing, and some writing, as I will later do, but again to you they are oral. You can only take to the jury room your recollection of the instructions as you hear them. The instructions are vital. They are intended to and must guide you in your consideration of the evidence. They're to give you the law applicable in this case.

This is an important case. All cases are important to the parties involved. This case is important to the government. It is important to the defendant. It is important to the public. It is important to you as jurors, because you're interested under your oaths and by virtue of your duty as jurors of returning the correct verdict in each instance on the merits under

the law and the evidence, free from sympathy for anyone, and free from prejudice against anyone. After I've instructed you, you will upon direction retire to the jury room to consider of your verdicts as to the seven counts with respect to the defendant James Anthony Allen.

The grand jury has returned an indictment against the defendants James Anthony Allen, Francis Clayton Keane, and Joseph Valentine Grismer. The defendant, Francis Clayton Keane, has pleaded *nolo contendere* to each of the seven counts. The defendant, Joseph Valentine Grismer, has pleaded *nolo contendere* to Count VII, the conspiracy count, and the first six counts were dismissed as to him. The disposition of the case as to those two defendants will be determined by the Federal Judge before whom they appear for sentence. It is expected that that Federal Judge will be Judge Driver, he having been the judge before whom those two pleaded *nolo contendere*. The defendant James Anthony Allen having pleaded not guilty to the indictment and each of the seven counts, is now on trial before you and you are now concerned in this case as to the guilt or innocence of the defendant, James Anthony Allen.

Inasmuch as the defendant Allen, who is now on trial before you, entered a plea of not guilty to the indictment and each count thereof, that means that he denies every material allegation in the indictment, which places upon the government the burden of proving beyond a reasonable doubt every essential, material allegation as to each of the seven counts.

It is your duty and I am confident that you will do your duty as jurors under the oath you've taken to conscientiously and seriously return a true verdict as to each of the seven counts under the evidence and these instructions. You can readily understand that the government can only be maintained by the impartial enforcement of the law. You as jurors are not concerned with whether or not the laws here involved ought to have been enacted, nor are you concerned with any penalty or punishment which may be imposed under the statutes in this case in the event a verdict of guilty under one or more of the seven counts is returned against the defendant Allen. You are simply concerned with returning the correct verdict of guilty or not guilty as to each of the seven counts. In the event there is a verdict of guilty the responsibility will be mine, and in the event the sentence I should impose would be too heavy, it would be my error and not yours. In the event I should be too lenient, the mistake would be mine, the fault mine, and in no wise yours. It is not the policy of the law that a verdict of guilty should be returned against anyone on trial unless such verdict is supported by the evidence beyond a reasonable doubt, but it likewise is against public policy that any guilty person should escape conviction if the evidence establishes beyond all reasonable doubt that he is guilty as charged.

It is my duty to instruct you as to the law governing this case, and it is your duty to take the law from me and accept that to be the law as stated to you by me, notwithstanding any statement or contention of

any attorney as to what the law is or ought to be, and despite any opinion of your own that the law is different or ought to be different than I state it to you to be. The mere fact that you may not have favor for any particular law, or laws, cannot rightfully be by you permitted to influence you at all in arriving at a verdict as to any of the seven counts here involved.

You are instructed that the law in an American court presumes every defendant in every trial and as to every type of charge to be innocent until he is proven guilty by the evidence beyond a reasonable doubt. This presumption is not a mere matter of form, but is a substantial right of every defendant in every case, as well as a substantial part of the law of the land, and it continues throughout the entire trial and until the jury finds that this presumption has been overcome by the evidence beyond a reasonable doubt. If after the jury has considered all the evidence produced, it then is convinced beyond all reasonable doubt that the defendant is guilty as charged, then the presumption of innocence is overcome by the proof of guilt, and such presumption of innocence disappears from the case, and it becomes the duty of an honest jury to return a verdict of guilty.

The indictment filed in this cause is merely the method provided by law whereby the United States, through a grand jury, and on behalf of the people, shall accuse or charge one or more persons of violation of the criminal laws of the United States, and whereby the one or ones accused shall be informed of



the accusations against him or them that he or they may defend against such. The fact that an indictment has been found and returned by the grand jury gives rise to no inference whatsoever that the defendant Allen is guilty of any offense mentioned in these instructions or mentioned in the indictment. The guilt of any defendant who pleads not guilty can only be established by proof at the trial of his guilt beyond all reasonable doubt, and such proof must be by the evidence; the indictment is not the slightest evidence at all.

The instructions which I am giving you are merely the method provided by law whereby the Court shall advise you of the law applicable to this case. These instructions must guide you in the consideration of the evidence and in the determination of what your verdicts as to each of the seven counts shall be. These instructions are to be by you understood, interpreted, and applied as a connected body and as an entirety. You will disregard any statement made by counsel on either side of this case as to what any testimony has been unless borne out by your final recollection thereof. You are, likewise, to disregard any testimony which may have been stricken by the Court, and you must, likewise, disregard any question or answer thereto to which the court sustained an objection.

You've been told that the evidence must establish the guilt of a defendant in an American court as to every charge beyond all reasonable doubt. Therefore it is important that I advise you as to what is meant

by proof beyond all reasonable doubt. Proof beyond all reasonable doubt does not necessarily mean that the evidence shall establish the guilt of the defendant beyond all possible doubt. The law does not require absolute certainty of guilt before there can be a verdict of guilty at the hands of a jury. While the law does not require proof of guilty to an absolute certainty, or beyond all possible doubt, the law does require proof of the guilt of the defendant beyond all reasonable doubt before there can be a conviction. The expression "reasonable doubt" means in law just what the words imply—a doubt founded upon some good reason. A reasonable doubt must arise from the evidence, or lack of evidence. Neither sympathy nor the desire of a jury to avoid performing a disagreeable duty constitutes a reasonable doubt. Neither a mere whim nor a vague, conjectural doubt founded upon mere possibilities, but not founded on reason, constitutes a reasonable doubt. A reasonable doubt is such a doubt as a sensible, honest-minded man or woman would reasonably entertain in an honest and impartial investigation to ascertain the truth about a matter as important and serious as are the matters involved in this trial.

In order to warrant conviction as to the seven counts, or any of them, the evidence need not be so strong as to exclude all doubt or possibility of error, but in order to warrant conviction as to any count, the evidence as to such count must be strong enough to exclude all reasonable doubt, that is, strong enough to exclude all doubt based on reason. If, after considering all the

evidence in this case, you can say that such leaves in your mind a firm, conscientious and abiding conviction of the guilt of the defendant James Anthony Allen as to any count or counts, then you are convinced beyond a reasonable doubt of the guilt of said defendant as to said count or counts, and then it would be your duty to find said defendant James Anthony Allen guilty as to such count or counts. On the other hand, if after considering all the evidence in the case you do not have a firm, conscientious and abiding conviction of the guilt of the defendant James Anthony Allen as to any count or counts, then you have a reasonable doubt as to such count or counts and then it would be your duty to find said defendant not guilty as to such count or counts. Proof beyond all reasonable doubt has frequently been defined as "proof to a moral certainty," but, while the proof must be strong enough to constitute a moral certainty of the guilt of the defendant on trial, it need not be strong enough to constitute an absolute certainty.

The indictment in this case is brought under three different statutes, namely, the so-called mail fraud law, the National Securities Act, and the conspiracy statute. The first three counts charge violation of the mail fraud law, Section 338, Title 18, United States Code, which, as far as now material, reads as follows:

"Whoever, having devised, or intended to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises \* \* \* shall,

for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed any letter, postal card, package, writing, circular, pamphlet, or advertisement \* \* \* in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter to be sent or delivered by the post office establishment of the United States, or shall knowingly take or receive any such therefrom \* \* \* or shall knowingly cause to be delivered by mail according to the directions thereon \* \* \*'' shall be punished as therein provided.

The next three counts, counts 4, 5 and 6 of the indictment, charge a violation of Section 17-A of the Securities Act of 1933 as amended, being Title 15, United States code, Section 77-q. This section reads as follows:

“It shall be unlawful for any person, in the sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly \* \* \* to employ any device, scheme or artifice to defraud.”

In the seventh count of the indictment it is charged that there was a conspiracy by the defendants Allen, Keane and Grismer and other persons to the grand jurors unknown, to commit violations of both the mail fraud law and of the securities act, including the violations charged in the first six counts, as well as other violations not necessarily charged in the first six

counts. The conspiracy statute as far as this case is concerned reads as follows:

“If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy” is guilty of conspiracy.

With respect to counts 1, 2 and 3 of the indictment charging violation of the mail fraud law, you will note that the offense as described by the statute I just read a little while ago to you consists of two parts, first, a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, and secondly, some particular act of using the United States Mails for the purpose of furthering or executing such scheme or artifice.

Count 1 charges that the defendant Grismer along with defendants Keane and Allen employed the scheme to defraud, and charged that for the purpose of executing this scheme and attempting so to do, the defendants on or about September 20, 1945, caused a letter to E. J. Gibson and Company, 5 Wall Street, Spokane, Washington, to be sent by the post office establishment of the United States.

Fraud alone against the public is not punishable under Federal law. It is only when the mails are used in some way in connection therewith that the Federal government can prosecute. After a fraudulent scheme



has once been put into operation each letter or other article of mail matter placed in the mails or received through the mails in furtherance of such scheme, or caused to be delivered by mail to the addressee in furtherance of such scheme, is a separate offense. An indictment could charge as many counts of violation of the law as there were acts of mailing or using the mails in the operation of the scheme. The indictment in this case charges in addition to the letter mentioned in count 1, the letter mentioned in count 2 addressed to Ben Redfield at Spokane, Washington, on June 13, 1946, and in count 3, the letter addressed to E. J. Gibson at Spokane, Washington, on May 25, 1946.

It is your duty as jurors to decide as to the defendant Allen first, whether there was such a scheme devised, conducted, joined in or participated in by defendant Allen, and secondly, whether the letters described in each of the three counts above mentioned were mailed pursuant to the scheme and for the purpose of executing and furthering same as alleged in the first three counts of the indictment. It is not necessary that you find that the evidence proves beyond all reasonable doubt that all of the elements of misrepresentation have been proved as to the defendant Allen, but it is sufficient in order to bring in a verdict of guilty as to counts 1 to 3 that you believe from the evidence beyond all reasonable doubt that the defendant Allen made or participated in the making of one or more of the essential acts or representations which I will later set forth, and that he made or participated in the scheme, and that the mails were used.

If the evidence fails to establish such essential elements which I will later more particularly advise you concerning, beyond all reasonable doubt, then it will be your duty to acquit the defendant Allen of the charges contained in counts 1 to 3, inclusive, or such ones of those three concerning which you have a reasonable doubt.

Counts 4, 5 and 6 of the indictment charge a violation of Section 17-A of the Securities Act of 1933, which I have previously read to you so far as applicable to this case. These counts charge that the defendants employed the scheme to defraud described in the first count, and used such scheme as described in the first count in the sale of securities as charged in counts 4, 5 and 6 by the use of the United States mail. The Securities Act makes it an offense to employ such a scheme to defraud directly or indirectly in the sale of a security, and a security within the meaning of this law includes stock certificates in a mining company. In order that you should find the defendant Allen guilty of the offenses charged in counts 4, 5 and 6, you must find from the evidence beyond a reasonable doubt that the defendant Allen devised or helped devise or joined in or participated in the essential part or parts of a scheme to sell securities in interstate commerce or through the use of the mails, directly or indirectly, that such scheme was fraudulent, and that a device, scheme or artifice to defraud was employed by the defendant, and as to these three counts, counts 4, 5 and 6, the essential parts of such scheme or artifice

in order to justify conviction will later be stated to you.

Just the same as with the mail fraud counts, it is not necessary that the evidence prove beyond all reasonable doubt each and all of the elements of misrepresentation set forth in the security fraud counts, and as referred to in count 1 of the indictment as to the defendant Allen to warrant a verdict of guilty as to these security fraud counts, but it is necessary to justify conviction as to any of said security fraud counts that the evidence establish beyond all reasonable doubt that the essential elements of said three security fraud counts with respect to the defendant Allen is proved in accordance with the instructions I will later give you as to what the essential elements to permit conviction are.

Count 4 charges the use of the mails on August 8, 1945, to Edwin LaVigne of Spokane, Washington. Count 5 charges the use of the mails on May 28, 1946, to E. J. Gibson of Spokane, Washington, and count 6 charges the use of the mails on June 12, 1946, to Edwin LaVigne of Spokane, Washington, for the purpose of selling securities in interstate commerce. In these counts likewise it is not necessary that the defendant Allen himself used the mails if you find that the defendant Allen participated in the scheme or device to defraud knowing that the mails would be used by other codefendants or employees in the perpetration of such scheme.

Count 7 charges a conspiracy among the three de-

defendants named. The conspiracy statutes as passed by Congress and interpreted by the courts provides that when two or more persons enter into a conspiracy or combination to commit any offenses against the United States, all acts done by any of them during the life of the conspiracy in furtherance of and to effect the objects of the conspiracy and unlawful agreement are chargeable to all of them. Such refers only to acts and statements made by the participants in the conspiracy and during the life and operation thereof. Anything done by any party either before the conspiracy began or after it ended will not be chargeable to anyone other than the party himself. However, it is a part of the law that when a criminal scheme or conspiracy is in operation, a person joining it at any time thereafter with knowledge of such criminal scheme or such criminal conspiracy becomes a co-conspirator, and if it was previously only a scheme of one individual, by joining it he changes such to a conspiracy as well as continuing it as a scheme.

In the present case, and with respect to statements and activities of the defendant, the question therefore is first, whether there was in operation a conspiracy or unlawful agreement or understanding among the defendants named in the indictment or some of them to violate the mail fraud law or the Security Act as charged in the indictment. If you find beyond a reasonable doubt that Allen participated in such, whether from the beginning or later during any portion of the period charged, then anything he did in furtherance of such conspiracy would be chargeable to him and



likewise anything that the other defendants or either of them did during the progress of such conspiracy while Allen was a member would be chargeable to Allen. This relates particularly to count 7 of this indictment, but as will be further stated, a scheme to defraud when the scheme is conducted by two or more persons is in substance and effect also a conspiracy. Such principle holds true with respect to counts 1 to 6, inclusive, of this indictment, which charge a violation of the mail fraud statute as to the first three counts and a violation of the National Securities Act as to the last three, providing you find beyond a reasonable doubt from the evidence that the defendant Allen participated with Keane and Grismer or either in connection with any such criminal scheme or conspiracy as charged.

Conspiracy may be established by circumstantial evidence or by deductions from facts. Common design is the essence of the crime of conspiracy, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together by common or different means, but if leading to the same unlawful result. If the parties act together to accomplish something unlawful a conspiracy is shown even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and actually unknown to the others. It is not necessary for the government to prove that the defendant Allen mailed any of the letters referred to in counts 1 to 6 of the indictment, or in count 7 of the indictment, if a fraudulent scheme were devised as



alleged in the first six counts or a conspiracy was formed as alleged in the seventh count and if the defendant Allen participated therein knowing that in reasonable probability the mails would be used for the purpose of aiding in the consummation of the scheme or the conspiracy, or if letters were mailed with the approval, knowledge or acquiescence of the defendant Allen, or if the defendant Allen knew that they would probably be or customarily be mailed by some other person in carrying out the scheme to defraud, even if they were mailed by a perfectly innocent person then the defendant Allen if there was actually such mailing would be just as guilty as if he had personally mailed the letter or letters himself.

The mail matter charged to have been mailed or delivered by mail in furtherance of a scheme to defraud may be, and frequently is, as perhaps it may seem in this case, entirely innocent on its behalf as far as its actual contents are concerned. Such mail matter need not be by itself effective to carry out the scheme, and need not be actually calculated to do so. It need not contain any misrepresentations or disclose any fraudulent purpose or show on its face that it was in furtherance of any scheme or artifice to defraud, but the mail matter mailed must have some relation to and be a step in the attempted execution of the scheme or conspiracy, and such mail matter must be mailed or caused to be mailed with intent to aid and further the purpose of the scheme or conspiracy.

Fraud within the meaning of the postal laws of the

United States may be any trickery or deception, any false pretenses, representations or promises for the purpose of obtaining money or property of another. This is true even when the persons resorting to such means intend to repay what they have obtained and intend to pay it without loss to the person or company at a later date, and even though the people who resort to such means intend to pay with interest or even profit or perhaps a bonus. It is not a good defense in a case of this sort that the defendants had confidence in the ultimate success of other mining enterprises other than the corporations in which stock was issued, and intended at some future date to repay any diverted money to the corporations from other sources, and that they expected ultimately to save the investors in the Pilot and Extension companies or either of them from loss, and even make a profit for them; if they intended to obtain the money or property of others by means of false representations or promises, there would be a violation of the law by the one so intending. The people to whom the money belonged were the ones who had a right to decide whether they wished the money diverted. They're the ones who had a right to say whether or not they wished to run such risk as there might be as to a bonus, profit, interest or future repayment.

Moneys obtained from investors for the development of a particular mine upon a promise or representation that the particular mine will be developed by use of such funds must be used for that particular mine, and any diversion of money to a foreign purpose,

however meritorious that purpose may be believed to be by the defendants, is a wrongful and criminal diversion.

The devising of an unlawful and fraudulent scheme or artifice is an act of the mind. You cannot possibly enter into any defendant's mind and by reason of such physical visitation determine his intention or purpose. The evidence of intent to devise and conduct such a scheme to defraud may be shown and usually must be shown by the acts and declarations of the parties concerned, and by the attendant circumstances as well as by direct evidence when direct evidence is available. Experience shows that positive proof of fraudulent intent is not generally to be expected. For that reason, among others, the law permits a resort to circumstantial evidence as a means of ascertaining the truth.

In order to constitute the offenses charged in this indictment it is not necessary to show that the defendants intended to defraud every person with whom they may have had dealings, or that the entire course of the transaction was a fraud. It is not necessary to show that all the moneys of the companies were diverted. No defendant would have the right to represent that all the money was to be used for the development of a certain company, and then divert only five per cent or one per cent; neither is it necessary to show or prove that the scheme or artifice or the conspiracy was all developed at one time. It may have been formed gradually.

\* \* \* \* \*

The Court: I realize, ladies and gentlemen of the jury, that the instructions, which are far from completed are long and difficult. The charge is complicated. There's seven counts, but if the defendants are guilty beyond all reasonable doubt they have no right to complain because they're charged with the complications which if they're guilty they constructed.

With respect to the several features of the scheme to defraud described in the first count of the indictment, you are instructed that it is necessary for the government to prove beyond a reasonable doubt at least some of the essential false pretenses, representations or promises therein charged and which I will later specify to you, were actually made. It is not necessary that all the allegations of the indictment be proved. However, it may all be proved. The government is only obligated to prove the essential ones. A scheme to defraud may be effected by one material misrepresentation, although where more are charged they may all be proved, but they need not all be proved.

To find the defendant Allen guilty of the offenses charged in any of the counts of the indictment it is not necessary to find that he committed personally all of the acts charged in such count or counts. The law holds that anyone who knowingly aids, abets or counsels in the commission of a crime for the purpose of aiding such commission is legally as guilty as if he individually perpetrated the entire crime himself. One may join a conspiracy after it has been formed, or may join a scheme of one individual and thereby not



only continue it as a scheme, but also make it a conspiracy, and if he participates knowingly for the purpose of aiding in the commission of a crime, he becomes a party thereto and is responsible just as though he was the one who originally conceived and planned the entire plan or conspiracy. One actor may drop out of a conspiracy and the others continue, or a new one may join, without the conspiracy terminating.

As I've already told you, a conspiracy may be proved either by direct or circumstantial evidence. It is not unusual for it to be proved by the use of circumstances. Men who agree to violate the statutes of the United States do not very often call in a stenographer and prepare a written agreement to that effect, or if they do, they do not usually make it available to any investigators. For this reason the law says that in a conspiracy case the government may be permitted to present its case on what the law calls circumstantial evidence. That is what the government is striving to do here. It contends that certain things happened and certain events occurred. It contends these could not have happened by mere coincidence unless there was an agreement or concert of action between at least two of the defendants, therefore it asks you as the jury to consider that there must have been a conspiracy. The government has the right to so contend, yet when it does ask for a conviction on circumstantial evidence, then it has the burden not only of proving the facts and circumstances beyond all reasonable doubt, but it must also satisfy you beyond all reasonable doubt that such circumstances are only consistent



with guilt. You must believe before you can find any defendant guilty in this cause that the circumstances proved as to him exclude all possibility, exclude all reasonable possibility of his innocence, and that after considering all the inferences reasonably to be drawn from the circumstances, your sound judgment requires you to reject other inferences and accept only the inference of guilt.

The law requires that you study all the evidence and that you weigh carefully the conclusions or the inferences favorable to the defendant as well as those unfavorable. The witnesses Francis C. Keane and Joseph V. Grismer in this case are confessedly what is known in law as accomplices. The fact that a witness is what is known as an accomplice doubtless operates and ought to operate largely against the credibility of his testimony, but the jury is not bound to reject such testimony merely because the witness is an accomplice. Accomplices are competent witnesses. Frequently the only proof of law infraction has to be through an accomplice or accomplices. It is your duty to consider the testimony of Mr. Keane and Mr. Grismer and each of them, but in so doing you should weigh the testimony of each and scrutinize the testimony of each with great care. You are to test the truthfulness of each of them by inquiring into the probable motives which prompted their testimony, and are to decide to what extent such motives might have colored or warped it. You are to look into the testimony of other witnesses in this case for corroborating facts or circumstances; where the testimony of an accomplice is sup-

ported in material respects by trustworthy evidence or by the facts and circumstances which you find to have existed beyond a reasonable doubt, then you ought to credit the testimony of an accomplice, but where the testimony of an accomplice is unsupported and uncorroborated, you should not rely upon it unless after the exercise of great care and careful scrutiny it produces in your minds beyond all reasonable doubt the conviction of its truth, and in such event, if you believe the testimony of an accomplice to be true beyond all reasonable doubt, you're justified in convicting upon the testimony of that accomplice without any corroboration at all.

You are the exclusive judges of what is the evidence in this case and of the weight and credit to be given the testimony of each witness. In doing this you should take into consideration the conduct and demeanor of the witness while testifying, his or her apparent candor and frankness or lack of such qualities, the reasonableness or unreasonableness of his or her testimony, its probability or improbability as measured by your common experience in life, the opportunity on the part of any witness of knowing or being informed concerning the matters about which he testifies, his intelligence or her intelligence or lack of intelligence, any prejudice or bias disclosed by him or her, any motive in your judgment which would cause him or her to warp or color the testimony one way or the other, and the interest, if any, which he or she may have in the outcome of the case.

If you find that any witness in the trial of this cause

either for the government or for the defendant has wilfully, that is intentionally and knowingly testified falsely as to any material fact, that is, as to any fact important in the case, then you are at liberty to disregard his or her entire testimony except insofar as such testimony is corroborated, that is, supported by other testimony which you accept as worthy of belief, or as corroborated, that is, supported by the facts and circumstances which you find to have existed under the evidence. These rules as to the testing of the testimony of any witness apply to the witness James Anthony Allen, the defendant on trial, as well as to each and every other witness in the case.

In the course of your deliberations you are not to consider in any manner sympathy for the defendant or members of his family, or any prejudice that you may have against him either personally or as a person engaged in mining enterprises, and if you are convinced beyond all reasonable doubt by the evidence of the guilt of the defendant Allen as to any count or counts, it is your duty to convict him of such count or counts, and you must not permit any prejudice, if any you have against the defendant Keane, to interfere. The trial is not the measure of the respective merits or any merits of the defendants Keane and Allen. It is to determine whether or not the defendant Allen is guilty. The defendant Keane has already pleaded *nolo contendere*, and the Judge before whom he appears will determine his responsibility.

The defendant Allen cannot of course be found guilty

of the commission of one or more of the offenses charged in counts 1 to 6, inclusive, or of the conspiracy count, count 7, by proof alone that he aided, abetted, or counseled the doing of the overt acts charged in paragraph 2 of each of said first six counts, or the overt acts charged in count 7, unless and until you further find from all of the evidence in the case beyond all reasonable doubt that he did such knowingly and intentionally to effect the scheme, artifice or conspiracy charged.

You are instructed that any fraudulent act done or intent entertained by the defendant Keane not disclosed to the defendant Allen would not be binding upon the defendant Allen or chargeable against him even though he may have directly or indirectly profited thereby. In order for the defendant Allen to be responsible for any unlawful act on the part of the defendant Keane, the defendant Allen at the time he shared in any such profits must have known that Keane had the scheme or was a part of the conspiracy charged. The defendant Allen is not charged in this case with the crime of embezzlement. This court would have no jurisdiction of a charge of embezzlement alone. Such a charge as far as the Lucky Friday Extension or Pilot companies would have to be prosecuted in the state courts, probably in the state courts of Idaho. Embezzlement, if there was such, becomes important only if the mails are used in connection with a scheme or conspiracy involving diversion of funds, either in connection with the scheme or conspiracy to violate the mail fraud law or the Federal Securities Act.



You are instructed that the defendant Allen had the legal right to sell any stock in the Pilot or Extension companies owned by him upon the following conditions: First, that such sale occurred after the expiration of one year after the date of the first offering of such corporation's stock for sale through an underwriter, or second, upon brokers transactions executed upon customer's order on any exchange or in the open or counter market, but not on the solicitation of such orders, but this right of the defendant to legally sell any such stock would only extend to such stock as he was selling independent of any criminal scheme or conspiracy to violate the mail fraud law or the securities act.

Again I may advise you that what punishment the defendant may receive in the event of his conviction of any count or counts is not to be considered by you in any respect or for any purpose in arriving at your verdict. The matter of punishment is for the Court alone. When you retire to the jury room it will be your duty as jurors to confer with each other freely and frankly about and to discuss with each other honestly the many questions involved in this case, for the purpose of agreeing, if you can honestly do so, on a unanimous verdict as to each of the seven counts in the indictment; however, your verdict as to each of the seven counts must be the honest verdict of each and all of you.

While as I have already advised you the law of this case is for the judge, and it is your duty implicitly to



accept and faithfully follow as correct all of the rulings that the Court has made in this case as well as to accept as correct the instructions now being given to you, I wish to tell you this further, that what the evidence shows, what weight you are to give the testimony of the various witnesses, and particularly what inference you should draw from the facts and circumstances proved, are exclusively your function. In respect to that you are independent, controlled neither by any opinion that the court may have or that you think the court may have, and in the event you think that I have already, or come to think that I have expressed an opinion about the guilt or innocence of the defendant Allen, or as to the credibility or weight to be accorded any testimony of any witness, this is to let you know that you're not bound or controlled at all by what the court thinks or by what you think the court thinks as to what the verdict should be. Such is your responsibility.

When a defendant testifies in his own behalf you may consider what interest he has in the outcome of the case and whether that interest has been sufficient to lead him to deny things that really are true, or to testify to things that are not true. You will weigh his testimony the same as you weigh the testimony of every other witness in the case.

There are two kinds of evidence, direct and circumstantial. Direct evidence is evidence of that which a person observes or sees, or which is susceptible of demonstration by the senses. Circumstantial evidence is

proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable inference or conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in every criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every reasonable theory except that of guilt. When circumstantial evidence is of that character, circumstantial evidence alone without any direct testimony at all is sufficient to convict, providing the jury is convinced beyond all reasonable doubt of the guilt of the defendant merely from circumstantial evidence, or if the jury is convinced by a combination of circumstantial and direct evidence of the guilt of the defendant as charged beyond all reasonable doubt, then the jury should return a verdict of guilty upon such combination of evidence, providing it is consistent with guilt, inconsistent with innocence, and inconsistent with any reasonable theory except that of guilt, or if the jury is convinced by direct testimony of the guilt of the defendant as charged, beyond all reasonable doubt, it is the duty of the jury to convict upon such direct testimony, but again it must be consistent with guilt, inconsistent with innocence, and inconsistent with any reasonable theory except that of guilt.

You may find the defendant Allen, in the event you are convinced beyond all reasonable doubt of his guilt, guilty of all seven counts of the indictment, or you may find him not guilty as to each of the seven counts, or

you may find him guilty as to some and not guilty as to others, depending upon whether or not you are convinced beyond all reasonable doubt as to such respective counts.

You are instructed that it is no defense that some other person or persons should also have been prosecuted.

It is not necessary to prove that the offenses charged in any count was or were committed upon the exact day alleged in the count. It is necessary that the evidence should show beyond a reasonable doubt that it was committed on or about the times or periods charged, and in any event, within three years before the return of the indictment, that is, at any time between May 6, 1945, and May 6, 1948.

When you retire to the jury room to deliberate upon your verdict you will select one of your number as foreman. You will consider your verdict as to each count separately, and will vote separately as to the guilt or innocence of the defendant as to each count. When all of you have agreed upon your verdict unanimously as to each of the seven counts, you will cause your foreman to fill in the verdict and sign such, and then you will return into open court. You will take with you to the jury room the exhibits which have been admitted in evidence, the indictment, and the form of verdict. The indictment is not in evidence and is not proof of anything, but will go with you to the jury room so that you will be better informed of the nature of the various counts and of the dates of the various

letters alleged. The verdict is in the usual form, and reads as follows: "District Court of the United States, Eastern District of Washington, Northern Division. United States of America, Plaintiff, vs. James Anthony Allen, Defendant, C-7975. We the jury in the above entitled cause find the defendant James Anthony Allen blank guilty as charged in count 1, blank guilty as charged in count 2, blank guilty as charged in count 3, blank guilty as charged in count 4, blank guilty as charged in count 5, blank guilty as charged in count 6, and blank guilty as charged in count 7 of the indictment. Blank, foreman." When you have unanimously agreed as to your verdict as to each of the seven counts, you will cause your foreman to fill in the blanks as follows: If as to count 1 you unanimously agree that the defendant Allen is guilty, you will cause your foreman to write in the word "is" in the blank before "guilty" so that it will read "is guilty." If you unanimously agree that your verdict as to count 1 should be not guilty, you will cause your foreman to write in the word "not" in the blank before "guilty" so that it will read "not guilty" and similarly as to each of the seven counts. You must have the foreman fill in the word "is" or the word "not" in each blank before each word "guilty" as to each of the seven counts, then your foreman will sign the verdict.

You may, as I've said, find him guilty as to some counts and not guilty as to others, or guilty as to all, or not guilty as to each one of the seven.



There are many exhibits which have been introduced in this case. It's not my intention to try to hurry you in arriving at your verdict. You of course are privileged to return your verdict quickly if you conscientiously arrive at such quickly, but the jury has a right and a duty to consider all the evidence and each and all of the many exhibits to that extent as is necessary or helpful to the jury in arriving at the correct verdict in each case, each count, to the best of the jury's ability. I think this is an appropriate time for a recess. There will be one of five minutes.

\* \* \* \* \*

The Court: There has been considerable mention in the argument by counsel on both sides as to what has been called Exhibit number 130, a combination of a trust agreement and a compromise agreement. You're not bound or controlled by any idea I may express as to the weight you should give that exhibit. You're privileged to give it the weight you think it is entitled to receive. I'm privileged to tell you, however, that personally I do not feel that that exhibit in any wise sufficiently weighs against the defendant to justify your returning any verdict against him on that account. It was a compromise, and it is generally the law that people make compromises for the purpose of settling that particular matter or matters, and that they do not expect to be held responsible on account of that settlement in some other transaction, and I'm letting you know that while you're free to give that exhibit the weight you think it is entitled to receive, that per-



sonally I consider that you'd be well justified in not holding that exhibit in any wise as against the defendant Allen.

You are instructed that in the event you are convinced by the evidence in this case beyond all reasonable doubt that the defendant Allen is guilty as charged of one or more of the counts of the indictment, it will be your duty to convict the defendant Allen of such count or counts regardless of how much more active in any such violation you may find some other person or persons to have been, regardless of whom you may find to have been the originator of any scheme or conspiracy, regardless of whom you may find to have been the dominating individual in connection with it, regardless of whether or not ultimately there was a profit or loss from any such over-all transaction, regardless of how interested you may find him to have been in any central development project, regardless of whether or not he spent any money in gambling, regardless of whether or not the original Lucky Friday Mining Company, usually referred to as the Big Friday, had more to gain or did gain more from the organization of the Lucky Friday Extension Mining Company and the Pilot Silver Lead Mines, Inc., or either of them than did the defendant or either of them, regardless of whether or not the defendants Allen and Keane had differences and parted company, regardless of how justified Allen was in having Keane removed from any authority in the management of the companies or either of them, regardless of whether or not one John Sekulic was or was not the one who originally

suggested the organization of the Extension Company, and regardless of whether or not after commission of such offenses Allen put in substantial sums in the Extension or Pilot or both.

However, in determining the guilt or innocence of the defendant Allen as to each of the counts, and in determining the reasonable probabilities and the reasonable credibilities, motives, and incentives of the respective witnesses, including the defendant Allen, you should give serious consideration to each and all of the foregoing as well as to all of the rest of the evidence, including the exhibits, and to all of the facts and the circumstances disclosed by the evidence, whether I've referred to such or not.

You are instructed that if a person knowingly, intentionally and wilfully violates the law, he is responsible for such violation regardless of whether or not he is to get any profit therefrom and regardless of whether or not if he expected a profit the share he expects of any benefits or profits that may be realized is large or small, regardless of whether or not he actually obtains the share he expects or is completely disappointed, and regardless of whether or not his share is or is intended to be greater than, equal to, or very much smaller than that of some other person with whom he is associated, or greater than, equal to or less than that part of some innocent party or company who participates in some part of the activity.

While I have told you that if you find any witness on any side of this case, including the defendant, has

wilfully, that is, intentionally, and knowingly, sworn falsely as to any material fact on the trial, that you are at liberty to disregard the entire testimony of such witness except as such has been corroborated, as I've told you, by other testimony or circumstances which you accept as true, this is to let you know that you do not have to disregard the entire testimony of a witness if you find that that witness has intentionally, wilfully sworn falsely to some material fact. If you find that a witness has wilfully and intentionally sworn falsely as to some material matter or fact, and you further find that he has testified truthfully as to some other matter or matters, and you determine that you can separate the false from the true, while you are at liberty to disregard the entire testimony of such witness except as it has been corroborated, as I've already stated to you, you are not required to disregard that portion of his testimony which you find to be true, but if you find that any witness on any side of the case, including the defendant, has wilfully sworn falsely as I've previously stated, as to any material matter, you're not required to undertake the difficult task of separating the chaff from the wheat, or the false from the true, and are at liberty to disregard all of the testimony which is not corroborated, that is, supported, as I've stated.

If you should find that any witness or witnesses have intentionally testified falsely as to any material matter in the trial, and if you have because of that decided to disregard the entire testimony of such witness or witnesses except as such has been corroborated,

as I've stated to you, then you should determine whether or not the remaining evidence establishes the guilt of the defendant Allen beyond all reasonable doubt as to the seven counts or any of them. In the event it does so establish his guilt beyond all reasonable doubt as to the seven counts or some of them, then it will be your duty to return a verdict of guilty in accordance therewith regardless of the fact that you may have disregarded the testimony of one or more witnesses for what you find to have been wilfully false testimony. I'm not suggesting by this that I do or do not believe that the defendant Keane or the defendant Grismer or the defendant Allen or any other witness has wilfully, knowingly or intentionally testified falsely as to any material matter. The determination of whether any witness or witnesses, including the defendant Allen, testified truthfully or otherwise is your responsibility.

In this case if you are convinced by such evidence as you consider worthy of belief, including the facts and circumstances which you find from the evidence existed, that the defendant Allen is guilty beyond all reasonable doubt as charged in one or more of the counts, it will be your duty to so find, regardless of how much or how little credence you may give to the testimony of the defendants Keane and Grismer or either of them.

In such connection, had the defendants Keane and Grismer or either of them come to trial before you in this case upon pleas of not guilty as to each and every count, along with the defendant Allen, and had either



or both of the defendants Keane and Grismer declined, as they would have had the right to decline, to take the stand, so that there would have been no evidence from them or either of them, it would still have been your duty to have found each of the defendants including the defendant Allen guilty providing you were so convinced beyond all reasonable doubt from the evidence before you without the testimony of Keane or Grismer or without the testimony of such one as did not testify. That is, you are instructed that the testimony of neither Keane nor Grismer is necessary to the government's case against the defendant Allen providing you are convinced beyond all reasonable doubt of the guilt of the defendant Allen from the other testimony, including the exhibits, facts and circumstances proved in the case to your satisfaction beyond all reasonable doubt. However, if you should disregard the testimony of any witness or witnesses, whether or not it be that of Keane and Grismer or either of them, and are not convinced beyond all reasonable doubt by the remaining testimony of the guilt of the defendant Allen as to any count or counts, then you should acquit the defendant Allen as to such count or counts concerning which you find a lack of testimony.

If you find beyond all reasonable doubt that the defendant Allen under all the evidence which you consider as worthy of belief is guilty of one or more of the counts charged in the indictment, you should return a verdict to such effect, regardless of whether or not you find that the defendant Keane deceived and cheated the defendant Allen or attempted to do so, and



regardless of whether or not Keane was as incapacitated from liquor as he testified. This prosecution is on behalf of the people of the United States, and if the evidence establishes the proof of the guilt of any person beyond all reasonable doubt, the fact, if it be a fact, that some associate in the violation was disloyal to the defendant on trial, or was otherwise guilty of misconduct, will not relieve such defendant on trial from his responsibility to the government and to the public for the violation.

In connection with each of the first three counts of the indictment, in order to sustain a conviction it must be established by the evidence beyond all reasonable doubt in addition to the other requirements for conviction, that the defendant Allen knowingly, wilfully and intentionally participated to some substantial degree in the scheme or artifice therein alleged, before the mailing of the particular letter charged in such mail fraud count. As to the next three counts in which fraud is charged in the sale of a security, in addition to the other requirements for conviction it is essential for conviction of the defendant Allen as to each of said Security Fraud counts that the evidence is established beyond all reasonable doubt that the defendant Allen knowingly, wilfully and intentionally participated to some substantial degree in the scheme or artifice described in mail fraud count 1 and referred to in and made a part of each Security fraud count, before the mailing of the particular letter charged in such Security fraud count.

As to count 7, the conspiracy count, it is not necessary for conviction that the evidence establish that the defendant Allen joined such conspiracy at any particular time, providing the evidence establishes beyond all reasonable doubt that the defendant Allen knowingly, wilfully and intentionally joined and participated in any such conspiracy before May 6, 1948, when the indictment was returned, and also before the commission in Spokane, Washington, of any one or more of the overt acts consisting of mailing or delivery of mail in Spokane, Washington, charged in count 7 and relating to that company or these companies concerning which you find the defendant Allen beyond all reasonable doubt conspired. In this connection it will be your duty to find the defendant Allen guilty of such conspiracy count if you find from the evidence beyond a reasonable doubt that he so knowingly, wilfully and intentionally joined and participated to some substantial degree in the conspiracy as charged either in connection with the Extension Company or the Pilot Company before the commission in Spokane, Washington, of at least one of the overt mailing acts charged and relating to that company concerning which you may find he conspired, even though he might not have had any connection with the other company, and even though some other person or persons may have participated from the beginning in such conspiracy and to a much greater extent.

You are advised that if a person by the doing of one act violates more than one Federal law he may

be prosecuted by separate counts for the different violations of different laws arising out of the same action. In a conspiracy charge there must be at least two involved; while the conspiracy count charges three, it's not necessary that the evidence establish that more than two were involved, but Mr. Allen cannot be convicted of conspiracy unless you find beyond all reasonable doubt that he conspired either with Keane or with Grismer.

You are instructed that you're justified in finding that the letters of notification and the prospectuses of the Pilot and Extension companies constituted representations. You have a right in considering the evidence to determine whether or not the defendant Allen's manner of keeping his records and receiving and paying money was in accord with his natural way of conducting his business, or whether it was wilfully done for the purpose of hiding and concealing his true connections with the Pilot and the Extension or either of them, or whether it was for the purpose of carrying on his business in the usual way, or was for the purpose of confusing or harrassing investigators.

In connection with this case, if you should find beyond all reasonable doubt that the defendant Allen knowingly, wilfully and intentionally diverted money on or about August 7, 1945, and on or about August 28, 1945, which belonged to the Extension Company, or on either of such dates or on or about either of such dates, that that would be sufficient to connect him with diversion of funds as charged, even though you should not be convinced beyond all reasonable doubt as to

other diversions, and in the event you should find beyond all reasonable doubt that he did knowingly, wilfully and intentionally divert money on or about either of the two dates of August 7 or August 28, 1945, and further find as charged in the indictment that such was done knowingly, wilfully and intentionally as a participant, even for that temporary period, in the scheme charged and the conspiracy charged, such would justify conviction of the defendant Allen as to such of counts 1, 4 and 7 as you might find under the evidence the defendant Allen was guilty of beyond all reasonable doubt, providing the respective mailings charged were mailed after any such diversion, in the event you should so find.

As to count 1 of the indictment, in the event you find beyond all reasonable doubt that the defendant James Anthony Allen as charged devised, joined or participated in, wilfully, knowingly and intentionally, any scheme or artifice to defraud purchasers and prospective purchasers of stock of the Lucky Friday Extension Mining Company, and that it was a part of such scheme, known to and participated in by such defendant Allen, that concealment would be made to the public and investors and prospective investors that Allen was a promoter of the Extension, and it also is established beyond a reasonable doubt that he was such a promoter before and during the organization of such companies, or if you're satisfied beyond all reasonable doubt in connection with count 1 that the defendant Allen knowingly, wilfully and intentionally participated in the scheme knowing and intending that the



Extension was to sell stock to investors upon the representation that the proceeds thereof would be used by the corporation for the exploration and development of the mining property of the Extension, and that in fact, such, to the defendant's knowledge, was not so used, or that the defendant Allen knowingly, wilfully and intentionally devised or joined in or participated in such scheme with the intention that a portion of the money due the corporation from its treasury stock would be appropriated and diverted from the Extension, or if the defendant Allen knowingly, wilfully and intentionally joined in such scheme as to the Extension, intending and agreeing that certain stock would be given to any attorney under the pretense that it was for attorney's fees, but that actually a part of it would come back to him as a promoter, for the purpose of defrauding the public, and if you further find beyond all reasonable doubt that after joining any such scheme and in connection therewith, and pursuant to the intention, the letter charged in paragraph two of count 1 was delivered at Spokane, Washington, as charged, then it would be your duty to find the defendant Allen guilty in any of said events of count 1, otherwise not guilty as to count 1.

I'm making it clear to you that he can only be convicted as to count 1 in the event he knowingly, wilfully and intentionally participated in the scheme in the method I have just stated with respect to the Extension Mining Company. That is because, although it's charged that he entered into a scheme both as to the Extension and the Pilot, the critical letter was mailed



before the Pilot under the evidence was organized or contemplated, so count 1 will only justify a conviction against the defendant Allen in the event he knowingly, wilfully and intentionally devised, joined or participated to a reasonably substantial degree in the scheme in one of the ways I have stated.

As to counts 2 and 3, the defendant Allen can only be convicted in the event he knowingly, wilfully and intentionally devised or helped devise, joined in or participated to a reasonably substantial degree in the same way or ways as to the Pilot Company as I have previously specified was necessary for the Extension, and then only if such devising, joining or participating was before the mailing and delivery of the letter mentioned in paragraph 2 of count 2, which was on June 13, 1946.

Similarly, as to count 3, the defendant can only be convicted as to count 3 provided he knowingly, wilfully and intentionally devised or helped devise or joined in or participated to the same degree in a scheme involving the Pilot, and before May 25, 1946, the date mentioned in count 3.

As to counts 4, 5 and 6, he can only be convicted as to count 4 in the event he joined, devised, helped devise or participated similarly in a scheme involving the Extension—just a moment, was that count 4?

The Reporter: Yes, your Honor.

The Court:—in the Extension before the mailing and receipt of the communication alleged to have been

sent or received on or about August 8, 1945, in the second paragraph of said count 4.

As to counts 5 and 6, the defendant Allen can only be convicted in the event you find such devising, joining or participating in a scheme involving the Pilot and before the respective letters therein involved.

As to each and every of said six counts, not only must you find such beyond all reasonable doubt, but you must find beyond all reasonable doubt that the letter was mailed or caused to be mailed or in the natural course of events should have been known by Allen that it would be mailed, and that it had for its purpose the furthering of the scheme as to the Extension in counts 1 and 4, as to the Pilot in counts 2 and 3, 5 and 6.

As to count 7, you can only find the defendant Allen guilty in the event you find that he knowingly, wilfully and intentionally devised or helped devise, joined or participated to a reasonably substantial degree in the conspiracy therein alleged, and that such conspiracy was for the purpose of doing at least one of the several things which I defined to you as necessary in order to justify conviction on count 1, and in addition, the evidence must establish beyond all reasonable doubt that the defendant either helped organize, joined in, or participated in such conspiracy knowingly, wilfully and intentionally before the doing of at least one overt act in Spokane, Washington. The reason that such must have been done in Spokane, Washington,

is to give this Federal Court in the State of Washington jurisdiction.

You shall consider all of the overt acts for such light as they may throw upon the guilt or innocence of the defendant. In addition, as to the conspiracy count, it is necessary that the particular overt act shall have consisted of the mailing or receiving through the mails of a letter or certificate related to the particular company concerning which the defendant Allen was involved in the conspiracy. If you find that the defendant Allen was involved in the conspiracy from the beginning, and as to both companies, then the commission of an overt act as to either company will suffice, but if you find that he was not involved in the Extension scheme or conspiracy, but do find beyond all reasonable doubt that he was involved in, as I've stated was necessary, a conspiracy involving the Pilot, it will be necessary for you to find that he joined or knowingly participated or knowingly joined, of course, such conspiracy before the mailing or the receiving in the mails at Spokane, Washington, of one of the letters relating to that particular company and described in the overt acts in the indictment.

You will have the indictment with you for your assistance and better understanding of the charges. It will be your duty to consider all this evidence carefully, impartially, dispassionately, for the purpose of arriving at the truth, and in doing such you will draw upon your experience, your judgment, your common sense, your understanding of the probabilities. You will re-

member at all times that you're officers of the court, under oath, charged with the duty of returning the correct verdict as to each count, and because there are so many exhibits you cannot properly discharge your duty as jurors until you have sufficiently examined and understood the various exhibits as to permit you intelligently and honestly to return the proper verdict as to each count.

You should view this testimony and all of the facts and circumstances in the same light as if you had been dispatched for the honest purpose of investigating this case and determining as an investigator whether or not the defendant Allen was beyond all reasonable doubt guilty, and if you had been such an investigator conscientiously performing your duties as an investigator, and if you had had presented to you all of the facts and circumstances and exhibits as have been introduced in this case, what would your decision have been as to whether or not you were then satisfied as honest, conscientious investigators as to whether the defendant Allen was shown beyond all reasonable doubt to be guilty.

If you would then have decided conscientiously and honestly that he was guilty of one or more of the charges, it would be your duty to have the same view here. If under such circumstances you would have an honest, conscientious, reasonable doubt, it's your duty to have the same honest, conscientious, reasonable doubt here. In one event you should return a verdict of guilty, and in the other event of course a ver-

dict of not guilty. You will now retire, not to consider this case. You will retire until called.

\* \* \* \* \*

The Court: Members of the jury, the Clerk of the Court for your convenience and with the consent of counsel on both sides has prepared a list of the exhibits by number which have been admitted, with a brief reference thereto, and they will be contained in various envelopes with the exhibit numbers indicated on the envelopes, so by referring to the list you may be able to look for, get and examine the respective exhibits. One exhibit, a picture, won't go in an envelope, so it will be outside.

I think I made it clear, but I wish to make it clear that all the evidence and all the circumstances which you find against the defendant as to any count and each and every part thereof must be established by the evidence to your satisfaction beyond all reasonable doubt, and while there are some more allegations in the charges than I mentioned as requisite for conviction, this is to let you know that the proof to your satisfaction of any portions of the charges other than one or more of the essentials which I specified with respect to count 1 and then by reference to the other counts, will not justify conviction, but if you find beyond all reasonable doubt one or more of the essentials that I specified to you, coupled with knowing, wilful and intentional devising, joining or participation in the scheme or conspiracy, and also find the



mailing as I've stated, such will substantiate conviction.

You of course will not consider any misrepresentation against the defendant Allen except such as was charged in count 1 of the indictment and by reference made a part of the other counts.

With respect to the instructions given, the court is satisfied that the defendant Allen and his attorneys in no wise objected to the length of the instructions or the complexity of such, and if any inference was given by the court in that respect, the jury will certainly disregard such.

I might say the number of the counts and the nature of the charge required me to give a much longer charge or instructions than I wish I could have felt satisfied to have given.

I as an example said you had a right to consider what your view would be if as honest, conscientious investigators you had investigated this matter with the honest, conscientious desire of arriving at the truth. In such connection I thought I made it plain to you, if I did not I would wish it understood that if you should so conduct an investigation it would be understood that you'd have all of the evidence presented to you, both exhibit and oral, as was presented here, and that you'd see the same manner of presentation by the individuals who appeared before you as the individuals displayed to you on the witness stand.

In the indictment it is charged that among other

things, the defendants in order to conceal the true amount of stock issued to them would and did cause large blocks of stock to be issued to Elmer E. Johnston of Spokane, Washington, and James E. Gyde of Wallace, Idaho, under the pretense that such stock was in payment of attorneys' fees, with the secret arrangement that a portion of such stock or the proceeds from its sale would be turned back to the defendants. This is to let you know that if you find beyond all reasonable doubt that the defendant Allen knowingly, intentionally and wilfully before the organization of either of such companies entered into any such agreement with such attorneys or either of them with the understanding that he was to get back part of such stock because he was a promoter, and so as to conceal such, that that would justify you in finding that he was a promoter, but you are instructed that if the evidence convinces you that Allen received any such stock and sold same to his profit, that that would not alone justify you in finding any guilt on the part of the defendant Allen unless you further find beyond all reasonable doubt that such was done knowingly, wilfully and intentionally by him in pursuance of a scheme or conspiracy to defraud and use the mails as a secret promoter as charged in the indictment, but if you find that Allen got some of that stock and sold it, that alone does not constitute any basis for conviction of the defendant Allen. The bailiffs may come forward and be sworn.

(Whereupon, Irene Keenan and R. R. Isaacs were sworn as bailiffs.)

The Court: You will take with you the exhibits, the form of verdict, the indictment, not as evidence, but merely as an aid to your memory, your recollection of the instructions, and your consciousness of the fact that you are jurors under oath and you will talk with each other just as much as may be helpful or necessary about every element of this case, about every witness, and every exhibit, and you'll give due regard to each other's opinion with the aim of arriving at a unanimous verdict as to each count, if you can honestly do so. There's no reason at all that you should endeavor to try to hurry your decision until you can actually unanimously and honestly agree as to each count. If that means that you can't do that until tomorrow afternoon, that's all right. If you can't do it until Sunday, it's your duty not to return your verdict until Sunday or such further time as is requisite for you performing your duties as jurors.

You may retire to consider your verdict. Just a moment; the alternate juror is especially thanked by the court for his services. He's now discharged. You've been a reserve soldier; you might have been essential. I'll tell you one thing; you're not obliged to tell anybody what your verdict might have been. If anybody asks you what your verdict would have been, you can say you don't care to comment, and as a matter of fact, you don't know what your verdict would have been; you might have an idea one way, but if you were to retire to the jury room and examine these exhibits and get the views of these eleven other jurors you might find the verdict you would return was just ex-

actly the opposite from what you would have returned alone, so you have no obligation to tell anyone. Thank you, and you're excused (1195-1249).

## SECOND SET OF INSTRUCTIONS

**Court's Instructions to Jury After Jury Had Been Deliberating on Its Verdict for More Than Twenty-Four Hours.**

The Court: Members of the jury, I have thought of the question which you presented to me before dinner. The question itself is short, and an apparent short answer would be that the first paragraph of count 1 of the indictment is repeated by reference in each of the other counts and also in the conspiracy count. I'm satisfied that that was not the question that troubled you, because you have the indictment with you, and you can read as well as I that in each of the subsequent counts the grand jury re-alleges as to counts 2, 3, 4, 5 and 6 all of the allegations of the first count of the indictment except those in the last paragraph of the first count, and you can likewise read as well as I can that in count 7, that paragraph 1 of the first count of the indictment is re-alleged.

I assume that there are two problems troubling you. One is whether or not the defendant is not charged seven times with the same offense, and the other is whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count. I may tell you in the first instance that the defendant is not charged seven times with the same offense. Second, it is not necessary that the government in connection with each of the subsequent counts prove every



allegation in the first paragraph of the first count. As a matter of fact, I told you yesterday that even as respects the first count, the government was not required to prove, although it was privileged to prove, all of the allegations of the first count, but it was not required so to do. For instance, as far as the first count is concerned, it is not necessary, as I told you yesterday, that the government prove that more than one person was connected with the scheme in the first count, although it was proper for the government to prove that there were two or three, and likewise I told you yesterday that as to counts 2, 3, 4, 5 and 6, that it was not necessary that the government prove that more than one person was involved in the alleged scheme, although it was proper to prove that there were two or three, but I did tell you that as to count 7, the conspiracy count, it was essential that the government prove that there were at least two involved, or it could not be a conspiracy, and in substance I advised you that if a scheme involved only one person, it was just a scheme, but that if it involved more than one person, the scheme was still a scheme, but it was also a conspiracy.

I further advised you yesterday that when one or more individuals devised a scheme to defraud, and that such scheme involved the using of the mails, that each time the mail was used was a separate offense, and that there could be as many counts as there were letters or other articles of mail as described in the law mailed, although the government was not required to charge as many counts as there were uses of the mail.



Now, as far as the first count is concerned, as I advised you yesterday, although the first count charges a scheme involving both the Extension and the Pilot Companies, as to the first count it's only necessary that the government prove beyond all reasonable doubt that the scheme involved the Extension, although it is all right if the government proved that it involved both, but as to the first count, the defendant cannot be found guilty, even if all the necessary and essential matters alleged are proved beyond all reasonable doubt, including the mailing of the letter, unless he at least was involved in the scheme with respect to the Extension and as to the first count it doesn't make any difference whether he was involved or not involved in any scheme affecting the Pilot.

As to the second count, as I told you yesterday it is essential that the government prove beyond all reasonable doubt in order to gain a conviction as to the second count, that Mr. Allen was involved in a scheme, as I instructed you yesterday, with respect to the Pilot, and as to the second count it doesn't make any difference whether the scheme involved the Extension or not.

Similarly, I told you yesterday that in order to justify a conviction as to the defendant Allen as to the third count, the scheme had to involve the Pilot Company; as I instructed you yesterday, it doesn't make any difference whether it involved the Extension or not, as to the third count.

As to the fourth count, the Security fraud count,

the letter there charged is charged as having been in connection with the Extension, so it is necessary that the fraud charged, in order to justify a conviction, it is necessary that any fraudulent scheme proved in order to justify a conviction as to the fourth count shall have involved the Extension, and it doesn't make any difference whether the Pilot was connected with such scheme or not; but as to the fifth and sixth counts, as I told you yesterday, the scheme in order to justify conviction of Mr. Allen as to either the fifth or sixth counts necessarily had to involve the Pilot, without it making any difference whether the government proved it did or did not involve both companies; so as to the first and fourth counts, in order to justify a conviction, in addition to the other things that I told you yesterday had to be proved beyond all reasonable doubt, it's necessary that the evidence establish that the scheme was in connection with the Extension Company, regardless of whether or not the Pilot was or was not involved. In order to justify conviction as to the second, third, fifth and sixth counts, or any of them, the evidence must establish beyond all reasonable doubt, in addition to the other matters I advised you yesterday, that it was the Pilot Company that was involved in the scheme, so that if you should be convinced beyond all reasonable doubt that the defendant was involved in the scheme to defraud as charged, and that he used the mails or that the mails were used as charged, but you found that the defendant Allen's connection was only established beyond all reasonable doubt with any fraud involving the Ex-

tension, you could then only convict him of counts 1 and 4 of the first six counts, and you'd have to acquit him of counts 2, 3, 5 and 6.

On the other hand, if you were to find beyond all reasonable doubt that the defendant Allen participated in the scheme to defraud as charged, and that the mails were used as charged and that he did the things that I stated yesterday were necessary for conviction, but that he did not become connected with any such scheme until sometime during the life of the Pilot, and then only in connection with the Pilot, you would have to acquit him as to counts 1 and 4, because they relate to the Extension, and then you could only convict him as to counts 2, 3, 5 and 6; but as to count 7, the conspiracy count, while the evidence may show, if you so find beyond all reasonable doubt, that the defendant Allen conspired with Grismer and Keane or either of them for the purposes of using the mails to defraud as charged, and/or using the mails for the purpose of defrauding as charged by the sale of securities through the mails—would you read that as to count 7?

The Court:—and with respect to both the Pilot and Extension Companies, it is not necessary that the evidence establish beyond all reasonable doubt that he participated in any conspiracy as to both companies as charged. It will be enough if the evidence satisfies you beyond all reasonable doubt that he participated in a conspiracy for any period as to either of the two companies or both, and as to either the mail fraud

act or the Securities Act, either or both, but as I told you yesterday, in the event you find beyond all reasonable doubt that he participated in a conspiracy with some other person or persons consisting of both Keane and Grismer or either, that it would be necessary to show that after he knowingly and intentionally and wilfully participated in any such scheme, that a mailing overt act was performed in Spokane, Washington, at least one overt mailing act as charged in Spokane, Washington, after he had commenced to participate knowingly in the conspiracy, and that such overt mailing charge was related to the particular company concerning which you find beyond all reasonable doubt any conspiracy he participated in was connected with, although I told you that if you found beyond all reasonable doubt that he participated in the conspiracy charged as to both companies, that then the overt act or acts could be as to either or both companies.

I further told you yesterday and made plain to you that as to each of the counts, including the seventh count, while it was proper for the government to prove the entire scheme to defraud in the conspiracy alleged, that it was not required that the government prove all of it—what was that last?

\* \* \* \* \*

The Court:—the government prove all of it, but only that the government was required to prove beyond all reasonable doubt that the purpose of the conspiracy, and likewise the purpose of the scheme, was



for the doing of at least one of the several things of the larger number mentioned in the indictment which I yesterday told you of.

If a person individually devises a scheme to defraud by use of the mails and he sends one letter, he can be charged in one count, if that one letter is in connection with and for the purpose of furthering the fraud, whether it succeeds or not. If he sends ten letters for the same single scheme of himself alone, he can be charged in ten different counts, one count for each letter, although the government doesn't have to and probably wouldn't charge him with that many counts. If, however, an individual joins with some other person or persons in a scheme to use the mails to defraud, and one letter is sent, whether by him or by one of the others, or as a natural consequence of the performance of the intended scheme which that party should know in all probability would occur, then that individual and the other individuals can be charged in one count with conspiracy, and then they can also be charged in addition to the conspiracy with a separate count for each letter that was mailed, so that if two or more persons form a scheme to defraud, using the mails, and send one letter, there could be two counts against them, one of conspiracy and one that they mailed a particular letter for the purpose of effecting the scheme to defraud. If two or more persons joined in the scheme together to use the mails to defraud, and ten letters were mailed, then the two or more could be charged with a conspiracy in one count, and they also could be charged in ten separate counts, one for each



letter that was mailed. That would make a total of eleven, and there's not a duplication of charges, because each mailing is a separate count. The conspiracy is another separate count, and if in addition the scheme to defraud is to not only use the mails, but to use the mails to violate the Securities Act by selling shares of stock in a corporation, then there can be a charge of conspiracy, another charge of using the mails to defraud, and a third charge of using the mails to defraud through the sale of securities.

I've said this much because I have felt that your question indicated two things, one that you were wondering whether or not the defendant was not charged seven times with the same count, which he's not, and the second, whether or not the government had to prove each and all of the allegations of each count, or of count 1, because it's referred to in the others, and again, the government does not, but the government does have to prove for conviction of the defendant Allen as to each and every count all of the things beyond all reasonable doubt which I advised you yesterday it was necessary for the government to prove.

I'll let you know now that all of the instructions that I gave you yesterday are in full force and effect, including the presumption of innocence, reasonable doubt, its definition, and all of the other things that I told you yesterday. You may now retire (1269-1277).



---

No. 12437

IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

---

J. A. ALLEN,

UNITED STATES OF AMERICA,

*Appellee.*

*Appellant,*

} No. 12437

---

*On Appeal from the District Court of the United  
States, for the Eastern District of Washington*

---

BRIEF FOR THE APPELLEE

---

HARVEY ERICKSON

*United States Attorney*

DONALD J. STOCKING

*Attorneys for Appellee*

---

FILED

111 20 1930

PAUL P. O'BRIEN,



# CONTENTS

	Page
Additional Statement of the Case .....	1
Supplemental Statement of Case .....	1
A. Pleas .....	2
B. Conspiracy Count.....	3
C. Diversions from Extension Funds .....	5
D. Diversion from Pilot Funds .....	6
E. Allen's Connection with Diversions .....	8
a. The Diversion of \$10,000 of Extension Funds to Delaware .....	8
b. Diversion to the Montana Leasing Company and its Successor, Lexington Silver-Lead Mines, Inc. ....	11
c. Diversion of \$15,000 of Pilot Funds to Coeur d'Alene Consolidated Silver-Lead Mines, Inc. ....	13
d. Diversion of Pilot Funds to War Eagle Silver-Lead Mines, Inc. ....	15
e. Diversion of Pilot Money to Indepen- dence .....	15
F. Sale of Promotion Stock by Allen .....	16
a. Extension promotion stock ....	16
b. Pilot promotion stock .....	18
G. Background of Allen's Part in the Promo- tion of Extension and Pilot .....	19
Argument .....	23
I. As to the Sufficiency of the Evidence (Ap- pellant's Point I) .....	23



II. As to the Termination of the Conspiracy (Appellant's Point II) . . . . .	26
III. As to Grismer's Participation (Appellant's Point III) -----	31
IV. As to Giving of Erroneous Instructions and Supplemental Instructions (Appel- lant's Point IV) -----	33
V. As to Inconsistency in Verdict (Appellant's Point V) -----	39
VI. As to Use of Conspiracy Charge for Pro- cedural Advantage (Appellant's Point VI) ..	40
Conclusion -----	42

## CITATIONS

Page

### CASES:

<i>Allis v. United States</i> , 155 U. S. 117 at 123.....	37
<i>Baldwin v. United States</i> , (CCA 9) 72 F. (2d) 810 at 814.....	26
c.d. 295 U. S. 761 810 at 814, c. d. 295 U. S. 761.....	26
<i>Caminetti v. United States</i> , 242 U. S. 470 at 495.....	36
<i>Catrino v. United States</i> , 176 F. (2d) 884.....	36, 40
<i>Charlton v. Kelly</i> , 156 Fed. 433.....	37
<i>Dunn v. United States</i> , 284 U. S. 390.....	40
<i>Glasser v. United States</i> , 315 U. S. 60.....	36
<i>Hudson v. United States</i> , 272 U. S. 451.....	2
<i>United States v. Glasser</i> , 116 F. (2d) 690 at 703 .....	36
<i>Krulewitch v. United States</i> , 336 U. S. 440.....	24
<i>Langford v. United States</i> , 178 F. (2d) 48.....	39
<i>Martin v. Sheely</i> , (CCA 9) 144 F. (2d) 754.....	41
<i>Robinson v. United States</i> , (CCA 9) 175 F. (2d) 4 .....	40
<i>Troutman v. United States</i> , (CCA 9) 100 F. (2d) 628 .....	40
<i>Westenrider v. United States</i> , 134 F. (2d) 772 (CCA 9) .....	36

### STATUTES:

18 U. S. C. Sec. 371 .....	40
Mail Fraud Statute .....	1

### MISCELLANEOUS:

Securities Act of 1933 .....	2
------------------------------	---



No. 12437

IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

---

J. A. ALLEN,

	<i>Appellee.</i>	} No. 12437
UNITED STATES OF AMERICA,		
	<i>Appellant,</i>	

---

*On Appeal from the District Court of the United  
States, for the Eastern District of Washington*

---

BRIEF FOR THE APPELLEE

---

ADDITIONAL STATEMENT OF THE CASE

In order that this court may have a brief and concise statement of this case it is necessary to restate the essential facts upon which the jury found the appellant Allen guilty. These are relatively simple and certainly not intricate.

I. *Supplemental Statement of Case.*

The appellant was charged jointly with Keane and Grismer of violating the Mail Fraud Statute and the

Securities Act of 1933, and with conspiring to violate both of these statutes. He was convicted on the conspiracy count.

#### A. Pleas

All the defendants first pleaded not guilty (R. 23-24). Then defendant Keane, upon motion of his counsel, persuaded the court (Judge Driver) to accept a plea of nolo contendere from him as to all counts and the plea of not guilty was withdrawn (R. 27-48). Later Grismer also persuaded the court to accept a plea of nolo contendere as to the conspiracy count (R. 49-54). The next day appellant Allen also withdrew his plea of guilty and entered a plea of nolo contendere as to all counts, except count VI, which was dismissed as to both Keane and Allen (R. 55-57).

The court at that time made it very plain to all the defendants that the court could impose any punishment up to the maximum upon a plea of nolo contendere (R. 45-46). Allen's plea of nolo contendere stood from January 13, 1949 to March 21, 1949, during which time the probation officer was making pre-sentence investigations at the direction of the court in order that the court would be advised as to the proper sentence to give each of the defendants. On March 21, 1949, the defendants appeared for sentence. On that date Mr. Emigh, one of appellant's counsel, asked the court before sentence was pronounced whether or not a jail or penitentiary sentence could be expected (R. 59-61). The court again stated that a penitentiary sentence could be imposed and cited the case of *Hudson v. United States*, 272 U. S. 451 (R. 61-64). Allen thereupon obtained the court's permission to withdraw his plea of nolo contendere and enter a plea of not guilty as to all counts. The order dismissing count VI as to



defendant Allen was set aside (R. 65). Judge Driver then disqualified himself from trying appellant's case (R. 64-69).

### *B. Conspiracy Count*

The conspiracy count, count VII of the indictment, charged that prior to June 1, 1945, and continuing until May 6, 1948, the date of the indictment, Allen, Keane and Grismer conspired to violate the Securities Act and the Mail Fraud Statute by using and intending to use the mails of the United States for the purpose of executing a scheme to defraud investors in stock of the Lucky Friday Extension Mining Company and the Pilot Silver-Lead Mines, Inc., (referred to as "Extension" and "Pilot" respectively) and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as follows:

1. That the defendants would and did promote and organize Extension and Pilot Companies and did conceal the fact that Allen was a promoter of these corporations or was to receive any portion of the stock.

2. That the defendants concealed the amount of stock issued to them and did misrepresent to the investors the amount of stock issued for attorney's fees.

3. That the defendants did represent to the investors that the proceeds of the sale of Extension and Pilot stock would be used for the development of these properties.

4. That the defendants would conceal from the stockholders information concerning the receipt and expenditure of moneys of these corporations.

5. That the defendants did not disclose the diversion from these corporations of a large amount of the corporate moneys for their own use and benefit.

6. That the defendants represented that they would spend the money or the entire net proceeds of the public financing by the sale of stock in these corporations on the mining properties of Extension and Pilot, whereas they spent only a small portion of the funds in the development of Extension and Pilot properties in order to create an appearance of mining activity and then disposed of their promotion stock by selling it on the market to the investing public without disclosing to the public that they had appropriated for their own use a large portion of the funds of the companies.

7. In pursuance of said conspiracy it was alleged that the defendants performed a number of overt acts, many of them being in the Eastern District of Washington.

These charges arose from the sale of common stock of Lucky Friday Extension Mining Company offered to the public in July 1945, and in January 1946, and from the sale of the common stock of Pilot Silver-Lead Mines, Inc., offered to the public in May 1946. These offerings of stock were sold through underwriters on the representation that the proceeds therefrom were to be used for the development of mining properties held by these companies. Instead, Allen and Keane, the promoters of these companies, fraudulently embezzled and diverted the largest portion of such proceeds to their own use and benefit, depleting the bank accounts of these companies whereby development of the companies' properties was rendered financially impossible. After their diversions, which assured the failure of these companies, these promoters unloaded large quantities of their personally-owned promotion stock on the investing public.

### *C. Diversions from Extension Funds*

There is no dispute as to certain essential facts established by both written and oral evidence and not contested by appellant. Extension's first offering, commencing in July 1945, resulted in the sale of one million shares of its stock to the investing public at 121½c a share, netting the company 10c per share or \$100,000. Almost immediately, even while this offering was still being made to the public and money coming in from the underwriters<sup>1</sup>, the diversion of Extension's funds began.<sup>2</sup> A second offering of three hundred thousand shares of Extension stock was made in January 1946, at 321½c per share, netting the company \$78,000 after paying underwriting commissions. Thus, Extension received \$178,000 from these two offerings. Of this amount, \$113,000 was diverted to Montana Leasing Company, or Lexington Silver-Lead Mines, Inc., its successor, between July 28, 1945, and May 17, 1946. Montana Leasing and Lexington Silver were wholly owned and controlled by the defendants, Allen and Keane, and both Allen and Keane spent money which came to these companies out of the Extension funds for their personal expenditures.<sup>3</sup> On August 7, 1945, the sum of \$10,000 of Extension funds was di-

---

<sup>1</sup> See Exs. 1, 2 and 3. (Numbered exhibits were introduced by appellee; lettered exhibits by appellant.) The first Extension money from underwriters was a check dated July 19, 1945. Money was received from Extension underwriters in July, August and September of 1945 and in January and February of 1946.

<sup>2</sup> \$1,500 was diverted from Extension to Montana Leasing on July 26, 1945; on July 28, 1945, \$3,500 was diverted; \$15,000 in August; \$12,500 in September; \$8,500 in October; \$6,000 in November 1945, etc. See Exs. 6a, 108, 109 and 118.

<sup>3</sup> See Ex. 120 Allen admitted that a number of his Montana Leasing and Lexington Silver checks were drawn for personal living expenses (R. 1115) and specifically referred to a check in payment of his boy at the race track (R. 1160).

verted to Delaware Mines Corporation, a corporation controlled by Allen (Ex. 6a). In a later portion of this brief Allen's connection with this particular diversion to Delaware is further detailed.

#### *D. Diversion from Pilot Funds*

In the latter part of May 1946, Pilot Silver-Lead Mines, Inc., offered and sold to the investing public one million shares of its common stock at 12½¢ per share, netting the company \$100,000 after payment of \$25,000 in underwriting commissions.<sup>1</sup> The Pilot money was also diverted from its bank account as fast as it came in from the underwriters and while sales were still being made to the investing public.<sup>2</sup> By June 1, 1946, only a few days after the commencement of the offering, \$42,000 had been taken by Allen and Keane and by September 12, 1946, there was an overdraft in Pilot's bank account caused by the diversions of over \$90,000 out of the \$100,000 received from the underwriters. These diversions from Pilot were as follows:

\$61,300 to Lexington Silver-Lead Mines, Inc., successor to Montana Leasing Company, between May 31, 1946 and August 23, 1946.

\$15,000 to Coeur d'Alene Consolidated Silver-Lead Mines, Inc. on May 22, 1946.

\$10,000 to Independence Lead Mines, Inc. on June 25, 1946.

\$3,000 to Extension on July 8, 1946.

\$1,200 to War Eagle Silver-Lead Mines, Inc. (also called War Eagle Mining Co.) on June 28 and July 31, 1946.

---

<sup>1</sup> Exs. 10, 11, 12 and 13, checks from underwriters to Pilot.

<sup>2</sup> Exs. 112 and 113.



Allen and Keane were jointly interested in all of the companies to which these diversions were made, with the exception of Independence, which was controlled by Keane. However, Independence had previously advanced large sums of money for joint enterprises of Allen and Keane (Ex. L).

Of the \$123,000 diverted from Extension only \$28,250 was ever repaid. Of the \$90,500 diverted from Pilot only \$15,165 was ever repaid. Thus, of the total diversions from Pilot and Extension, amounting to \$213,500, there still remained \$170,085 which was not put back into these companies, most of this money having been dissipated by Allen and Keane for their personal expenditures (Keane R. 663, 664, Ex. 120).

The Extension and Pilot stock was sold to the public on the express representation that the proceeds therefrom were to be used for the development of the mining properties owned respectively by these companies.<sup>1</sup> The net result, however, was that out of the \$178,000 received from the sale of Extension stock only about \$80,000 was spent for company purposes, and out of the \$100,000 received from the sale of Pilot stock less than \$18,000 was spent on the mining property.<sup>2</sup>

During all of the time this stock was being sold the money was being wrongfully and fraudulently diverted, which fact of course was not made known to the stock purchasers. As a result of these wrongful diversions, both companies soon were without funds, and mining operations ceased (Grismer R. 407).

<sup>1</sup> See Ex. 68, Pilot prospectus, and Ex. 69, Extension prospectus. Also Exs. 81 and 89, and Ex. "A", documents filed with Seattle Regional Office of the Securities and Exchange Commission and with the License Department of the State of Washington.

<sup>2</sup> See Exs. 108 and 112; also Exs. T and U, audit reports on Extension and Pilot, respectively. Grismer R. 392 and 407, Horning R. 264.



### *E. Allen's Connection with Diversions*

Since the foregoing facts are not and can not be disputed, the only issue is whether any substantial evidence connected defendant Allen with the conspiracy to divert these funds. The jury found by its verdict that such evidence existed, and it is our purpose to briefly refer to some of the evidence which supports the jury's verdict.

#### *(a) The Diversion of \$10,000 of Extension Funds to Delaware*

On August 7, 1945, while the first offering of Extension stock was being sold to the public, Allen obtained two blank Extension checks signed by Irene Vermillio, Keane's secretary. These were Extension checks No. 8 (Ex. 6a) and No. 9 (Ex. 6b). Keane officed in the Gyde Building in Wallace, Idaho, and Allen, when in Wallace, used Donald Callahan's office across the hall in the same building. Allen had Beatrice McLean French, Callahan's secretary, fill in these blank checks. French performed secretarial and stenographic services for Allen from time to time when he was in Wallace (French R. 338).

Extension check No. 8 (Ex. 6a) was filled in for \$10,000, dated August 7, 1945, and made payable to Delaware Mines Corporation, which company was controlled by Allen (Allen R. 1028, 1029). Allen then had French deposit this \$10,000 check to Delaware's account, and at the same time had her prepare three Delaware checks<sup>1</sup> distributing this \$10,000 as follows: \$3,000 to Montana Leasing Company; \$6,000 to Callahan Consolidated Mines, Inc.<sup>2</sup>; and \$1,000 to W. H.

<sup>1</sup> French kept blank Delaware checks signed by Allen and Keane for the purpose of preparing checks for them from time to time (French R. 329).

<sup>2</sup> Allen had been vice-president of Callahan Consolidated (Allen R. 1023).

Hansen, a Wallace attorney. Allen then had French deposit the \$3,000 check in the Montana Leasing bank account, and she also deposited the \$6,000 check in Callahan Consolidated's account.

Extension blank check No. 9 (Ex. 6b) was at a later time filled in by French, at Allen's direction, for \$5,000, dated August 28, 1945, made payable to Montana Leasing Company, and deposited in that company's bank account on August 28, 1945. The significance of this diversion to Montana Leasing will be discussed later.

The foregoing facts were established by the following evidence, which was not controverted by appellant:

1. Testimony of Irene Vermillion that at Allen's request she signed and delivered the blank Extension checks No. 8 and No. 9 to Allen in the Callahan office (R. 163-171).

2. Testimony of Beatrice McLean French regarding these related transactions (R. 328-339).

3. Notation "To J. A. A." made by Vermillion on Extension check stubs No. 8 and No. 9 (Ex. 5a).

4. Two Montana Leasing Company checks (Exs. 8-c-1 and 8-c-2) dated August 7, 1945, and bearing Allen's signature, were also drawn by French for Allen's personal expenditures on August 7, 1945, in the Callahan office, showing Allen's presence in that office on that date (French R. 339).

5. The Delaware deposit slip (Ex. 34) for banking Extension check No. 8, the Montana Leasing deposit slip (Ex. 35) for banking the \$3,000 check from Delaware, and the Callahan deposit slip (Ex. 44) for banking the \$6,000 Delaware check, all were prepared on August 7, 1945, by French, who also on the same day credited the \$6,000 Delaware payment to Callahan Consolidated to repay funds (French R.

333) which Allen had previously borrowed from Callahan Consolidated on behalf of Delaware (Keane R. 645-647).

6. The Extension checks No. 8 and No. 9 (Ex. 6a and 6b), the three Delaware checks (Ex. 41a and 41b), and the Montana Leasing checks signed by Allen (8-c-1 and 8-c-2) were all typed on the Underwood typewriter used by French in Callahan's office and were stamped with the check protector in that office (French R. 337).

7. The records of the Samuels Hotel in Wallace, Idaho (Exs. 77 and 78) disclose that Allen registered at the hotel on August 6, 1945, checking out August 10, 1945, and that Allen again registered on August 27, 1945, checking out August 30, 1945 (Comini R. 514-522), showing that Allen was in Wallace on both August 7 and August 28, 1945, the days on which Extension checks Nos. 8 and 9 were deposited in the Delaware and Montana Leasing accounts, respectively.

8. Keane was not in Wallace during business hours on August 7, 1945, but had left early that day and was gone for several days on a fishing trip. (Vermillion R. 202, Keane R. 648, Horning R. 264-265). This confirmed his denial of any knowledge about the drafting of Extension checks Nos. 8 and 9 (Keane R. 643).

It is submitted that this uncontroverted evidence links Allen to this fraudulent diversion of Extension funds to Delaware and Montana Leasing just as conclusively as though his signature appeared on those checks which he obtained from Vermillion on August 7, 1945. It should be noted that Allen did not deny any of this significant and damaging evidence, and

has in fact very carefully avoided mention of it in his brief.

(b) *Diversion to the Montana Leasing Company and its Successor, Lexington Silver-Lead Mines, Inc.*

Reference has already been made to Allen's direct diversion of \$5,000 of Extension's money to Montana Leasing Company's account by means of the blank check which he obtained from Vermillion, had French prepare, and which was deposited in the Montana Leasing account on August 28, 1945. In addition to this check, the evidence disclosed that Allen was connected with all of the diversions of money from both the Extension and Pilot accounts to Montana Leasing and its successor, Lexington Silver-Lead Mines, Inc.

Numerous Extension checks (Ex. 6) and Pilot checks (Ex. 15) were made out directly to Montana Leasing Company or Lexington Silver-Lead Mines, Inc.<sup>1</sup> Irene Vermillion testified (R. 157, 187) that she signed these checks at the direction of both Keane and Allen, (R. 225, 226, 233, 234). Keane testified that these checks were written by Vermillion under his or Allen's directions and that he and Allen regarded these diversions as loans to Montana Leasing or Lexington Silver-Lead (Keane R. 615, 657). There was, of course, no corporate authorization by either Extension or Pilot for the taking of this money (Keane R. 658). Keane stated that Vermillin had general instructions from Allen and Keane to take funds from whatever source available to cover outstanding checks arising out of their Montana mining operations, which involved the issuance of substantial checks to meet

---

<sup>1</sup> See Exs. 108 and 109 for list and summary of Extension checks, and Exs. 112 and 113 for list and summary of Pilot checks. Also see Exs. 118 and 119 showing deposits to Montana Leasing and Lexington Silver.



payrolls (R. 617) as well as the issuance of checks for their personal expenditures, (Allen R. 1115 and see Ex. 120). Keane further testified that the bank would notify his office of overdrafts in the Montana Leasing and Lexington Silver-Lead accounts, and arrangements would then be made to immediately cover such overdrafts by the transfer of Extension or Pilot funds (R. 619).

That Keane's testimony is supported in fact is clear from an analysis of Exhibits 118 and 119, which are summaries showing deposits in the Montana Leasing and Lexington Silver accounts and the bank balances in those accounts on the specific dates on which deposits of Extension and Pilot checks were made to those accounts. There were twenty such deposits made with checks drawn on Extension or Pilot funds when there were overdrafts in the Montana Leasing bank account, and seventeen deposits from Extension and Pilot funds when the Montana Leasing or Lexington Silver bank account showed a balance of less than \$1,000.

For example, when the first Extension money was deposited in the Montana Leasing account on July 26, 1945, it covered an overdraft of \$1,322.70, and the August 28, 1945 check for \$5,000, which Allen prepared, covered an overdraft of \$458.99 in the Montana Leasing account (Exhibits 118 and 119). In this connection it is interesting to note that, as shown by Exhibit 120, which is a schedule of checks signed by Allen on the Montana Leasing and Lexington Silver bank account from July 1945 through August 1946, Allen drew a Montana Leasing Company check for \$350 to Helen A. Allen, his wife, on August 28, 1945, the same day the \$5,000 he diverted from Extension went into the



Montana Leasing account to cover an overdraft. On the next day, Allen drew a check payable to cash for \$600. A comparison of these exhibits reveals many other instances where deposits of Extension and Pilot funds were made to cover overdrafts immediately preceding or during a time when Allen was writing substantial checks on the Montana Leasing-Lexington Silver account.<sup>1</sup>

During this period, when a total of \$174,300 of Extension and Pilot funds were diverted to the Montana Leasing-Lexington Silver account, both Allen and Keane were drawing substantial checks against that account and spending some of the money for their living expenses, drinking and gambling (Keane R. 662-664). From July 1945 through August 1946 when this account was largely dependent on the funds embezzled from Extension and Pilot, Allen wrote over 260 checks, totaling \$49,327.91 (Ex. 120). It is submitted that Allen's connection with these diversions to Montana Leasing and Lexington Silver was well and amply established by the evidence.

(c) *Diversion of \$15,000 of Pilot Funds to Coeur d'Alene Consolidated Silver-Lead Mines, Inc.*

The first check received from the sale of Pilot stock by E. J. Gibson & Co. of Spokane, one of the underwriters, was in the sum of \$40,000 dated May 23, 1946 (Ex. 31A). Keane testified (R. 626-627) that Allen came to Wallace from Spokane, walked up to Keane

---

<sup>1</sup> See in Ex. 120 eleven checks drawn by Allen, September 29 through October 4, 1945, all payable to "Cash", totaling \$1,350, preceding an overdraft of \$1,048.50 on October 4, which was covered by a deposit of \$2,500 of Extension funds on October 5; and an overdraft of \$146.79 on October 5, which was covered by a deposit of \$1,000 of Extension money on October 6, as shown on Exhibit 119.

at the Metals Bar, handed him this \$40,000 check, and stated:

“How’s that for bringing in the money, Bucko?”

This \$40,000 with another Gibson & Co. check for \$10,000, made a total of \$50,000 in the hands of these promoters. This \$10,000 check (Ex. 31) was payable to James Gyde and covered the sale of some promotion stock issued in Gyde’s name but which by prearrangement actually belonged to Keane and Allen.

Allen then informed Keane that he wanted \$25,000 out of this money for the Coeur d’Alene Mines Corporation contract (Keane R. 627). A contract had been entered into by Coeur d’Alene Consolidated Silver-Lead Mines, Inc. (jointly controlled by Allen and Keane) with Coeur d’Alene Mines, requiring the payment of \$25,000 for work which Coeur d’Alene Mines was to do in connection with the development of the Coeur d’Alene Consolidated property (Ex. 39). Allen had signed this contract for Coeur d’Alene Consolidated as president, and Grismer had signed as secretary. Keane first deposited \$25,000 to the credit of Coeur d’Alene Consolidated and took the duplicate of the deposit slip back to the Metals Bar. Allen, however, advised him that he wanted a cashier’s check, (Keane R. 628) and Keane then returned to the bank and obtained a cashier’s check, made payable to Coeur d’Alene Mines, which check was escrowed with the agreement. (Ex. 39). The remainder of this \$50,000<sup>1</sup>, made up by the two Gibson checks, was disposed of as follows: \$20,000 was deposited to the credit of Pilot, and \$5,000 paid to Keane in repayment of a previous

---

<sup>1</sup> See testimony of Leo G. Kraemer, Pro Manager of Idaho First National Bank of Wallace (R. 313-316), for an explanation of how this money was handled at the bank.

advance, referred to in the Pilot prospectus (Ex. 68). Thus, out of the first \$40,000 received from Pilot stock sales, \$15,000 was diverted for use on behalf of Coeur d'Alene Consolidated at Allen's specific direction (Keane R. 629).

(d) *Diversion of Pilot Funds to War Eagle Silver-Lead Mines, Inc.*

Two Pilot checks dated June 28, 1946 and July 31, 1946, totaling \$1200 were issued to War Eagle Silver Lead Mines, Inc. (Ex. 15a and 15b). This company was owned by Allen, Keane and one Ben Porter, each owning a  $\frac{1}{3}$  interest (Keane R. 655). Porter had told Allen and Keane that he would need about \$10,000 during the summer of 1946 to do some work at the War Eagle Mining property, and Keane and Allen agreed that they probably would be able to help out (Keane R. 655). About June 28, 1946 Vermillion called Allen and told him that the bank had called Keane's office about an overdraft on the War Eagle account. Allen then instructed Vermillion to cover this overdraft (Vermillion R. 199). The two Pilot checks totaling \$1,200 were prepared by Vermillion pursuant to this instruction given her by Allen, and they were deposited by her in the War Eagle account (Vermillion R. 200).

(e) *Diversion of Pilot Money to Independence*

On June 25, 1946, after the commencement of the offering of the Pilot stock, \$10,000 of Pilot's money was diverted by a check to Independence Lead Mines, Inc. Independence was the only company to which funds were diverted in which Allen did not exercise at least joint control with Keane. However, even in the diversion to Independence, Allen was closely con-

nected. Keane testified that he discussed with Allen the diversion of this \$10,000 of Pilot's funds to Independence, and that Allen agreed to it. (Keane R. 656-657). Previously, as shown by defendants' Exhibit L, considerable sums of money had been advanced to Montana Leasing by Independence (Keane R. 690).

The schedules attached as a part of Exhibit L also show that a large portion of this money was furnished by means of checks made payable to the order of James A. Allen which were deposited in the Montana Leasing account. This was admitted by Allen (Allen R. 1123 and 1124). Thus Allen's acquiescence in Keane's plan to divert Pilot money to Independence is understandable, since he and Keane had previously financed their joint Montana operation out of Independence funds.

All of this evidence connecting Allen with the misappropriation and diversion of Pilot and Extension funds to Delaware, Montana Leasing-Lexington Silver, Coeur d'Alene Consolidated, War Eagle and Independence, clearly justified the jury's verdict that Allen was one of the conspirators.

#### F. *Sale of Promotion Stock by Allen*

##### (a) *Extension promotion stock*<sup>1</sup>

Keane and Allen decided on the amount of Extension promotion stock to be issued, and that out of the 500,000 shares purportedly issued for attorney's fees to Elmer Johnston and Keane, 425,000 shares were to belong to Allen and Keane (Keane R. 614). Allen made the arrangements with Johnston under which 200,000 shares were issued to Johnston, out of which Johnston, however, retained only 75,000 shares, re-

---

<sup>1</sup> See Ex. 106 for schedule of original issue of Extension shares.



turning 125,000 to Keane for Allen and Keane (Johnston R. 546, and Keane 624, 625). 60,000 shares of the 425,000 shares of promotion stock were sold through brokers' accounts in the name of J. A. Allen and Helen Jorgenson (Allen's wife's maiden name (R. 501) ) for a total of \$13,410.20 in November and December of 1945 (Ex. 114, Greene R. 815-825). This money went to Allen (Exs. 75, 104, 105; Greene R. 816).<sup>1</sup> 200,000 shares were sold by Keane and Allen to J. T. Halin in October 1945, Allen delivering the stock. Halin paid \$20,000 for this stock, \$13,000 in a check to Keane and \$7,000 in cash to Allen (Halin R. 794-801).<sup>2</sup> An additional 75,000 shares were sold to Halin by Allen in January 1946 at 24½ cents per share or \$18,375.00 (Halin R. 795). This accounts for the sale of 335,000 shares of Extension stock out of 425,000 shares represented to be issued for attorney fees. Allen and Keane realized \$51,785.20 from the sale of this stock.<sup>3</sup>

Out of the 1,229,700 shares of Extension stock issued to Grismer for mining claims, Grismer actually was to get only 100,000 shares, the balance belonging to Allen and Keane subject to certain commitments made to others (Keane R. 614). As shown in Ex. 116, there were 455,000 of these shares sold for \$57,217.36 through various brokerage accounts in the names of Helen Allen, Helen Jorgenson (Allen's wife's maiden

<sup>1</sup> J. A. Hogle and Co. check (Ex. 105) for \$6,872.95, dated December 3, 1945, and payable to J. A. Allen, was deposited in Montana Leasing account on December 5, 1945. (See page 6 of Ex. 118 and also Ex. 9a, Montana Leasing deposit slips.)

<sup>2</sup> See Denney's testimony R. 870-872 and Ex. 96 tracing this stock.

<sup>3</sup> By October 1945, Keane and Allen had already diverted \$41,000 of Extension money to Delaware and Montana Leasing (Exs. 108, 119, and 6a). By January 1946, when both the promotion stock and the second corporate offering of stock sold at premium prices, nearly \$60,000 had been taken by Keane and Allen from the first \$100,000 received from Extension underwriters.



name), B. A. McLean and J. A. Allen. Ex. 74 shows that 265,000 of these Extension shares were sold through Helen Allen's account at E. J. Gibson & Co., at prices ranging from 12 cents up to 31 cents a share, during the period from July 2, 1946, through December 28, 1946. The McLean account was also Allen's (Exs. 47 and 50a; Allen R. 1134-1135; French R. 344-349).

While the government in its case did not undertake the task of accounting for the disposition of all certificates issued out of this Extension promotion stock, the foregoing evidence connects Allen with the sale of 790,000 shares of Extension promotion stock for which \$109,002.56 was received.<sup>1</sup>

All of this stock was sold by Allen after the series of fraudulent misappropriations from Extension by Allen and Keane had begun. It is reasonable to assume that the purchasers would not have bought this Extension promotion stock, or at least would not have paid premium prices for it, if they had known that the funds necessary for the development of the Extension properties had been and were being stolen.

#### (b) *Pilot promotion stock*<sup>2</sup>

Allen and Keane also made the arrangements as to the Pilot stock issued for services (Keane R. 621). Keane and Allen were to own 550,000 shares of the amount issued to Keane and also to own 400,000 shares out of the 900,000 shares issued to Grismer (Keane R. 622, 623). An agreement similar to that with Johnston in connection with Extension was made with James Gyde, a Wallace attorney, who was to retain only 25,000 shares out of the 150,000 shares purport-

<sup>1</sup> Allen admitted receiving substantial amounts from the sale of his Extension stock (Allen R. 1139).

<sup>2</sup> See Ex. 110 for schedule of original issue of Pilot shares.

edly issued to him for legal services. Keane and Allen arranged that the balance of 125,000 shares be returned by Gyde to them (Keane R. 624; Gyde 279). Out of these shares 120,000 shares were sold immediately to E. J. Gibson & Co., netting Keane and Allen \$12,000 (Exs. 31 and 31a).<sup>1</sup> Keane and Allen used \$10,000 of this amount to make up the amount of a payment on their Coeur d'Alene Consolidated Company's contract with Coeur d'Alene Mines, as previously mentioned in subdivision E(c) of this brief (Keane R. 626-630). As disclosed in plaintiff's Ex. 117, out of the Pilot promotion stock issued to Keane, Allen disposed of 275,000 of these promotion shares between December 1946 and January 15, 1948, for the sum of \$9,062.

Thus Allen was connected with the sale of 395,000 shares of the Pilot promotion stock for the sum of \$21,062.00. If the \$109,002.56 obtained from the sale of Extension promotion stock is added to this amount the evidence showed Keane and Allen received from the sale of the Pilot promotion stock, it makes a total of \$130,064.56 realized from the sale of the promotion stock issued by these two companies, of which \$105,064.56 was received directly by Allen.<sup>2</sup>

#### G. *Background of Allen's Part in the Promotion of Extension and Pilot*

Appellant has set out at considerable length his version of the facts leading up to the formation of Extension and Pilot and of the purported distant part he played in the affairs of these companies. This is the

---

<sup>1</sup> Actually these defendants sold 145,000 shares of this Pilot stock to Gibson but \$2,500 was paid to Gyde for his 25,000 shares (Gyde R. 280).

<sup>2</sup> Exs. 114, 116, 117, and Halin R. 794-801.

same story which appellant attempted to "sell" to the jury. Much of the evidence referred to by appellant in his brief regarding his relationship to numerous companies and his future plans for the deep development of that part of the Coeur d'Alene District near Mullan, Idaho, was entirely immaterial to the issues involved in appellant's trial. The trial court allowed appellant a wide latitude in putting his story before the jury. However, now that this case is being appealed, this collateral but irrelevant evidence should properly be disregarded. Because of appellant's repetition in his brief of many extraneous facts, a short statement of the real background leading up to the promotion of Extension and Pilot appears to be warranted.

Without going into all of the details, the essential facts are these: In the summer of 1943 Allen and Keane formed the Montana Leasing Company, a Montana corporation, for the purpose of operating some mining dumps located near the Lexington Mining Company's property at Neihart, Montana (Keane R. 609). Allen claimed the Montana Leasing Company continued to operate as a corporation, while Keane claimed the corporation was abandoned and that he and Allen were partners operating under the partnership name of Montana Leasing Company (Keane R. 610). This controversy is, of course, not material to the case. Their respective interests in and control of the enterprise were identical.

The first money for this Montana operation was taken by Keane from Independence, and a large portion of it consisted of checks issued by Independence payable to Allen, which Allen endorsed and deposited in the Montana Leasing account. (See Defendant's Exhibit L, attachments to Randall's audit of Indepen-

dence.) By the middle of 1945, however, the Independence funds having been nearly exhausted, the plan to organize and promote Extension was conceived by Allen and Keane for the purpose of supplying a new source of needed funds for their Montana Leasing operation (Keane R. 611). Allen advised Keane that he had acquired the Extension ground from John Seculic. It was understood that Allen could not appear or be known as a promoter of Extension, as he was under a court injunction (Ex. 121) which had the effect of precluding, for a three-year period, the use of exemptive Regulation A of the General Rules and Regulations, under the Securities Act of 1933, for any offering of securities made by a company of which Allen was a promoter (Keane R. 613, Johnston R. 514). For this reason, Grismer, who had worked for Allen for some time as manager of Callahan Consolidated, was made to appear as the principal promoter (Keane 612, 614).

After Extension was launched, Pilot was formed in December 1945 (Ex. 68, Ex. A), and Allen and Grismer obtained mining properties for Pilot (Grismer R. 396-397). Allen and Grismer made the arrangements and Allen closed the deals for the purchase of these properties (Keane R. 621, 622).

The evidence showed that Allen took an active part in the promotion of both Extension and Pilot. On behalf of these companies Allen, with Keane, employed and gave instructions to Vermillion (R. 151, 181, 190), French (R. 328) and Evans (R. 368-374). Allen told Grismer that he and Keane had decided to promote Extension, that they wanted Grismer to be president of the company but that they would take care of all of the details (Grismer R. 385) and that Keane would



handle the financial affairs (R. 390). Allen also directed Grismer to locate the Extension claims in Grismer's name (R. 386), and to endorse the promotion stock certificates issued to Grismer and turn them back (Grismer R. 388, 399). Allen sent Grismer to start negotiations with Herrick for the Cincinnati claims to go into Pilot (Grismer R. 396) and with Mrs. Phelan (R. 397) for the Phelan claims. Allen then made the final arrangements for the acquisition of these claims by Pilot (Grismer 396, Phelan 285-289, Herrick 296, Keane 621).

As early as May 1945 Allen and Keane talked to Johnston regarding the preparation of a public offering of Extension stock (Johnston R. 539). Allen conferred with Johnston regarding the material to be included in both the Extension and Pilot selling prospectuses (Johnston R. 543 and 567). On February 23, 1946, Allen paid for a part of the cost of taking aerial photographs, one of which was used in the Pilot prospectus, his check given in payment being initialed "PSL" for Pilot Silver-Lead (Ex. 8-i-1; Johnston R. 554-5). On May 14, 1946, Allen paid Johnston with a \$1,000 check as part payment for Johnston's legal services in connection with the Pilot offering (Ex. 8-e-1, Johnston R. 556). In October 1945, Allen met Johnston at Wallace and persuaded Johnston, as an accommodation, to endorse a group of certificates (Ex. 50a) which had been issued in Johnston's name but which Johnston stated belonged to Keane (Johnston R. 559-560). These certificates were sold by Allen through J. A. Hogle & Co. on December 1, 1945 (Ex. 114). Allen's part in arranging with Johnston and later with Gyde for the "kickback" of promotion stock purportedly issued for legal services has already been explained



(Supra under sub-heading "F"; Johnston 546, Gyde 279).

In May and June 1945 when Extension was negotiating a contract with Lucky Friday Silver-Lead Mines Company (The Big Friday) and later when a supplemental agreement was made, Allen was the principal negotiator on behalf of Extension (Horning R. 260). Allen had previously advised Horning, a Wallace attorney representing the Big Friday, that Arthur Lakes would do the surveying on the Extension claims (Horning R. 274). Allen paid Lakes with several checks marked "Extension" or "Pilot" for work which Lakes had done at these properties (Lakes R. 957-967; Exs. 8-a-1, 8-g-1, 8-i-2, 8-m-1, and 122).

The foregoing array of evidence readily convinced the jury beyond a reasonable doubt that Allen played a major role in the organization and promotion of Extension and Pilot and that his contention that he first became interested in Extension in the fall of 1945 and after the first offering of stock had been sold (R. 1037) was false.

## ARGUMENT

### I. *As to the Sufficiency of the Evidence (Appellant's Point I)*

The answer to Appellant's argument that Allen did not conspire with Keane and Grismer is to say that there is abundant evidence to prove that he did conspire with Keane and Grismer. The testimony of Keane and Grismer, both accomplices, is to the effect that there was a conspiracy with Allen to obtain moneys and property by fraud. The testimony of the following witnesses corroborates beyond question that

of the accomplices to the effect that there was such a conspiracy:

Irene Vermillion, Record 148-209  
 Emeline A. Phelan, Record 285-286  
 W. H. Herrick, Record 295-298  
 Charles E. Horning, Record 258-263  
 Glynn D. Evans, Record 368-381  
 Elmer Johnston, Record 537-555  
 James E. Gyde, Record 279-283  
 Arthur Lakes, Record 957-971

Allen's participation as disclosed by the testimony of these witnesses and documentary evidence is pointed out clearly in the first part of this brief.

The case cited by the appellant of *Krulewitch v. United States*, 336 U. S. 440, is totally inapplicable to the situation here. The *Krulewitch* case is a case involving conspiracy where statements of co-conspirators, made after the termination of the conspiracy, were admitted in evidence over objection. Counsel for appellant cites at length certain extracts from the concurring opinion of Justice Jackson in the *Krulewitch* case which are certainly not the law as applied to conspiracy in federal courts. However, the cautions mentioned by Justice Jackson have been observed and followed by the Government in this case. Appellant's argument is in effect that Congress should repeal the conspiracy statute.

The testimony in this case shows beyond any doubt that during certain periods of time mentioned in the indictment there existed a closely-knit continuing concert of action involving Allen, Keane and Grismer in the organization of both Pilot and Extension, in the sale of stock to the public by means of prospectuses containing false and misleading representations, in the embezzlement and diversion of the funds of these cor-

porations, and in the dumping of personally-owned promotion stock on the market at enhanced prices after looting the corporations' treasuries. This is illustrated by the Court's summary at the time sentence was imposed.

"Before imposing sentence, under all the circumstances I think I can well say that my own opinion is that Mr. Allen and Mr. Keane were about equal in their activities, Mr. Keane more active in one direction, Mr. Allen perhaps in another. Mr. Keane by virtue of his office and his name and his signature having been used, it seems to me was guilty to an absolute certainty whether he pleaded *nolo contendere* or not. Mr. Allen, being conscious of an injunction, put himself in a position where the evidence was not to an absolute certainty, but was beyond all reasonable doubt. Mr. Grismer was substantially a dupe, as I see it. Under all the evidence he was responsible for the law violation he engaged in, but he was a rather inconsequential participant." (R. 1290)

Appellant's complaint that the Government should have called Keane as its first witness rather than the sixteenth does not warrant a reply. The order of Government witnesses is still a matter to be determined by the prosecutor subject, of course, to the discretion of the trial court. We recall no objection by appellant during the trial regarding the order of the Government witnesses.

Nor was it necessary to produce a defrauded investor to prove the fraud as appellant now suggests. The evidence showed that the prospectuses which carried the false and misleading statements concerning the intended use of the proceeds from the stock sales, the names of the promoters, the amounts of promotion stock issued, the maintenance of proper books and

records, etc., were sent through the mails by the underwriters to thousands of customers in several different states. Certainly none of these investors were told that the stock for which they were sometimes paying premium prices was issued by persons who at the same time were diverting, embezzling and stealing the investors' money. There can be no doubt but that every investor was defrauded and the funds of both companies were all dissipated.

It is submitted that appellant's arguments as to the insufficiency of the evidence to connect him to the conspiracy fail in the face of the overwhelming evidence introduced by the Government and believed by the jury.

## II. *As to the Termination of the Conspiracy (Appellant's Point II)*

The argument made by the appellant that any conspiracy ended on December 26, 1946, assumes that when two or three criminals, who are in a conspiracy, have an argument or a falling-out, that that of itself terminates the conspiracy. It is a recognized fact that often "thieves fall out" or have violent disagreements or quarrels among themselves but this in itself does not end the conspiracy unless definite and positive steps are taken indicating a withdrawal or termination. *Baldwin v. United States*, (CCA 9) 72 F. (2d) 810 at 814. c.d. 295 U. S. 761. It is also common knowledge that conspirators can enter a conspiracy or withdraw therefrom during its continuance and that the conspiracy nevertheless goes on. In this case the Government's theory throughout was that there was only one continuing conspiracy and that was to organize two companies, the Extension and the Pilot, to use the



mails in selling the stock of these companies by means of false prospectuses, to divert and use the majority of the funds of each of these companies for the purposes of the conspirators, and for them to then unload their promotion stock on the public. The evidence showed that Allen was still selling out the promotion stock originally issued to Grismer long after December 26, 1946 when both Allen and Grismer admittedly had knowledge of the bankrupt condition of these companies and after their quarrel with Keane. The conspirators' sale of promotion stock without disclosing their appropriation of corporate funds was an essential part of the conspiracy charge and the Government was entitled to prove it. This was certainly evidence of a continuing concert of action between Grismer and Allen.

The Court found no difficulty in overruling appellant's contention that the conspiracy ended in December, 1946. This point was raised by appellant at the conclusion of the Government's case and the Court said:

"Aside from that, the motion it seems to me has no real merit for the reason that under the evidence the jury has a right to find that Mr. Allen and Mr. Grismer were conspirators, and certainly that conspiracy, if there existed one, didn't end in December, 1946. It might have become more active and ripened more . . . the jury would be entitled to find from this evidence as it now stands that Mr. Keane and Mr. Allen were the primary conspirators, that Mr. Grismer was the dupe of both until December, 1946, and thereafter he became the dupe of Mr. Allen, and that Mr. Allen while pretending to have no interest or connection with Mr. Keane, was actually associated with him in some sort of an unholy partnership as



evidenced by the money that he got, which is very difficult to understand if he had no connection with the stock, so that I think you can make your motion as to certain exhibits, stating the time. I'm going to deny them on the basis of the date of December, 1946, being the end of any conspiracy and even if it were the end of any conspiracy the acts of Mr. Allen or the advantages he obtained with respect to the Pilot or the Extension or the Montana Leasing are of evidentiary worth to aid the jury in determining the truth." (R. 930, 931)

Following this suggestion of the Court that the acts of Mr. Allen or the advantages he obtained after December, 1946 were of evidentiary worth, let us assume for the purposes of argument that the conspiracy terminated as appellant contends on December 26, 1946. There would still be no reason to exclude any of the evidence which appellant argues should not have been admitted. Plaintiff's Exhibit 48, mentioned specifically in appellant's brief (p. 73), are E. J. Gibson & Co. checks made payable to "Cash" and "B. A. McLean" (French) in payment of Extension stock which was transferred from Certificate 14, which was the promotion stock issued in the name of Grismer (Ex. 116). The proceeds from these checks went to Allen (Allen R. 1134; French R. 344-349). Evidence of Allen's disposition of any of the promotion stock at any time regardless of when the conspiracy terminated was certainly material on the question of Allen's participation as a promoter and of his disposition of stock after draining all of the money from the corporations. Under any other theory the Government would be foreclosed from proving that a defendant became co-owner of promotion stock if he were clever enough to wait until after a disagreement with his co-conspirators before disposing of his share of the promotion

stock and realizing that additional portion of the fruits of his fraud.

Although no further evidence is directly specified in appellant's brief as having to do with transactions after December 26, 1946, we will discuss certain exhibits containing documents of a later date. Exhibits 6 and 7, the Extension cancelled checks and bank statements, were introduced in evidence to show the complete disposition of the corporate funds which were fraudulently obtained from the public as the result of the conspiracy. In effect, appellant introduced the same evidence in the form of Randall's audit of Extension covering a period ending June 30, 1947 (Ex. T). As a matter of fact, only three items in the Extension account came after December 26, 1946; a salary check to Glynn Evans on January 2, 1947, a small check to Western Union on January 31, 1947 and a check for \$246.07 on March 13, 1947 to close out the Extension account. It is submitted that these exhibits were clearly admissible regardless of the date of the termination of the conspiracy.

The same situation prevails as to Exhibits 14, 15, 16 and 17, the Pilot deposit slips, checks, bank stubs and bank statements. Appellant put in evidence Pilot's financial picture up to June 30, 1947 through Randall's audit of Pilot (Ex. U). After December 26, 1946 only six relatively small Pilot checks were written. Five of these were written in January, 1947, one to Keane, one to Vermillion, two to Internal Revenue and one to the Idaho Unemployment Compensation Division. The last check was written on February 18, 1947 to Higgins Machine Works. Deposits of approximately \$1,000.00 in January and February, 1947 covered these few checks. In any event the inclusion of this tag-end of

documentary evidence showing the effect on these corporations of the illegal diversions was in no way prejudicial to appellant. Analysis of the other exhibits containing documentary evidence dated 1947 (Exs. 97, 98, 99, 100 and 101) will show that they were all records necessary to support Denney's summaries showing the disposition of promotion stock by Allen through Standard Securities Corporation, a Spokane broker, or its proprietor, Paul Sandberg. In order to trace the promotion stock by certificate numbers this broker's "in-and-out records" for Extension (Ex. 97) and Pilot (Ex. 100) had to be examined. Part of the stock was disposed of through the brokerage company so that the Standard Securities Company checks (Ex. 98) and Allen's account with this broker (Ex. 99) were essential and these transactions are reflected in Denney's summaries (Exs. 116 and 117). A small portion of the stock was disposed of through Paul Sandberg personally so that the personal checks which he had given to Allen (Ex. 101) were introduced in evidence as the slips attached to these checks referred to the certificates which Sandberg received from Allen. All of these exhibits show that Allen disposed of promotion stock through Sandberg and Standard Securities Company. The number of shares disposed of and source of the stock are disclosed in the summaries (Exs. 116 and 117).

It is submitted that regardless of the date of the termination of the conspiracy all of this documentary evidence was clearly admissible as direct evidence against Allen, to show his participation as a promoter of Extension and Pilot and his continued sale of the promotion stock after he had participated in the diversion of the funds of these companies. The exact date

of the conspiracy's termination might be important if any of the evidence introduced involved admissions made to a third party by one of the conspirators since such are admissible against a co-conspirator only if made during the course of the conspiracy. It is submitted that there was no such evidence presented in this case and the exact date of the conspiracy's termination is of no importance.

As the Court pointed out,

"What happened after 1946 can be of great assistance to the jury in knowing what the relationship was before 1946, in December, so that what Mr. Allen did as to stock after December, 1946, that had originally come to Keane before December, 1946, is very pointed in the inference it allows as to the truthfulness of what Mr. Keane is saying and as to the falsity of the inferences on cross-examination." (R. 929)

### III. *As to Grismer's Participation (Appellant's Point III)*

It is difficult to see how appellant's argument as to Grismer's innocence is of any material assistance to appellant or any reason for reversing the jury's verdict as to appellant. However, the best answer to appellant's argument that Grismer was not a conspirator is to point out that Grismer entered a plea of nolo contendere to the conspiracy count after conferring with his counsel. Consequently it was not necessary for the Government to submit all of its evidence proving that Grismer was a conspirator. There would be no purpose of a plea of nolo contendere or guilty if a defendant had to be proven guilty after his admission of guilt as a conspirator. In addition the testimony of Grismer shows that he participated in the organizing of these companies, agreed to serve as a president



and manager, respectively, signed false financial statements as president and failed in his duty to disclose the true financial affairs of these companies.<sup>1</sup> He permitted his name to be used as a front and turned over his promotion stock to Keane and Allen so that it could be sold even after the corporate funds were all dissipated.

As Judge Black stated in denying appellant's motion for a judgment of acquittal at the conclusion of the Government's case,

"There is much in the evidence that would indicate that Mr. Keane and Mr. Allen were the conspirators and that Mr. Grismer was a dupe. However, a dupe can be a conspirator. Usually a dupe who is a conspirator gets little of the proceeds, and under the evidence the jury would have the right to believe that Mr. Allen and Mr. Keane together took advantage of Mr. Grismer as a dupe until December, 1946, at which time Mr. Allen monopolized the advantages of Mr. Grismer." (R. 930)

Counsel cites no authority nor is it believed that any can be cited to the effect that appellant has any right to challenge the guilt of any defendant who with the advice of competent counsel has entered a plea to a count in the indictment. Counsel for appellant Grismer has not joined with the appellant Allen in Allen's contention that Grismer is not guilty of conspiracy. In any event it is difficult to say how this argument has any bearing on Allen's guilt or innocence.

---

<sup>1</sup> See statement filed May 7, 1946 with Department of Licenses for State of Washington contained in Ex. A.



#### IV. *As to Giving of Erroneous Instructions and Supplemental Instructions (Appellant's Point IV)*

Argument is made by appellant Allen that the court committed error in instructing that the testimony of Keane and Grismer was not necessary in the case against Allen, provided the jury was convinced beyond all reasonable doubt of his guilt from the other testimony in the case. Because appellant omits any reference to the court's prefacing statements, which are essential to an understanding of his purpose in so instructing the jury, and which precludes any inference or suggestion on the part of the court as to Allen's guilt if Keane's testimony is eliminated, we include them here in full:

"If you should find that any witness or witnesses have intentionally testified falsely as to any material matter in the trial, and if you have because of that decided to disregard the entire testimony of such witness or witnesses except as such has been corroborated, as I've stated to you, then you should determine whether or not the remaining evidence establishes the guilt of the defendant Allen beyond all reasonable doubt as to the seven counts or any of them. In the event it does so establish his guilt beyond all reasonable doubt as to the seven counts or some of them, then it will be your duty to return a verdict of guilty in accordance therewith regardless of the fact that you may have disregarded the testimony of one or more witnesses for what you find to have been willfully false testimony. I'm not suggesting by this that I do or do not believe that the defendant Keane or the defendant Grismer or the defendant Allen or any other witness has willfully, knowingly or intentionally testified falsely as to any material matter. The determination of whe-

ther any witness or witnesses, including the defendant Allen, testified truthfully or otherwise is your responsibility.

"In this case if you are convinced by such evidence as you consider worthy of belief, including the facts and circumstances which you find from the evidence existed, that the defendant Allen is guilty beyond all reasonable doubt as charged in one or more of the counts, it will be your duty to so find, regardless of how much or how little credence you may give to the testimony of the defendants Keane and Grismer or either of them.

"In such connection, had the defendants Keane and Grismer or either of them come to trial before you in this case upon pleas of not guilty as to each and every count, along with the defendant Allen, and had either or both of the defendants Keane and Grismer declined, as they would have had the right to decline, to take the stand, so that there would have been no evidence from them or either of them, it would still have been your duty to have found each of the defendants including the defendant Allen guilty providing you were so convinced beyond all reasonable doubt from the evidence before you without the testimony of Keane or Grismer or without the testimony of such one as did not testify. That is, you are instructed that the testimony of neither Keane or Grismer is necessary to the government's case against the defendant Allen providing you are convinced beyond all reasonable doubt of the guilt of the defendant Allen from the other testimony, including the exhibits, facts and circumstances proved in the case to your satisfaction beyond all reasonable doubt. However, if you should disregard the testimony of any witness or witnesses, whether or not it be that of Keane and Grismer or either of them, and are not convinced beyond all reasonable doubt by the remaining testimony of the guilt of the defendant Allen as to any count or counts, then you should acquit the defendant Allen as to such

count or counts concerning which you find a lack of testimony." (R. 1228-1230)

We submit that these statements of the court could hardly be said to be described by appellant where he said:

"The court's instruction that the testimony of Keane and Grismer was not necessary to convict Allen was erroneous, of material prejudice to defendant Allen, and requires a reversal." (App. Brief 87)

It has always been the prerogative of the Federal courts to comment upon the evidence. Remarks of Judge Black which are the subject of appellant's objection, however, hardly seem properly described as a comment on the evidence, but are instead purely a correct statement of the law for the guidance of the jury. We submit that under the circumstances of this case the court properly instructed the jury in this connection, and the instruction when taken as a whole was more than sufficient to avoid being misconstrued as carrying any suggestion of the court's impressions to the jury.

In this case, as has already been pointed out, there was abundant and overwhelming direct evidence against the appellant Allen, without the testimony of Keane and Grismer. The Government's case against Allen was not dependent upon their testimony nor upon circumstantial evidence; there was the testimony of numerous independent witnesses to the fact of Allen's participation in the conspiracy (*supra*, p. 24).

We submit that the jury was not precluded from finding Allen guilty on the testimony of independent witnesses merely because his accomplices Keane and Grismer testified after entry of their pleas of *nolo contendere*.

Most of the argument developed by appellant against the use of Keane and his evidence by the Government was argued at length to the jury, and is one that should not be made over again to this court, since the trial court properly and adequately cautioned the jury as to Keane's being an accomplice and also gave the necessary cautionary instructions with regard to the manner and extent to which his testimony should be credited (R. 1215-1216).

Appellant's discussion of accomplices as witnesses, based on cases most of which are over 100 years old, does not express the modern law as to the use of accomplices' testimony. The rule as to accomplices' testimony which exists in Federal courts was correctly stated by Judge Black in this case (R. 1215-1216). The testimony of an accomplice is required to be subjected to close scrutiny and examination, and weighed with great care and caution; it can be attacked before the jury as being unworthy of belief and prompted by unworthy motives (as it was in this case); but, nevertheless, a conviction for conspiracy can rest upon the uncorroborated testimony of an accomplice. *United States v. Glasser*, 116 F. (2d) 690 at 703. (Reversed on other grounds, *Glasser v. U. S.*, 315 U. S. 60;) *Westin-rider v. U. S.*, 134 F. (2d) 772, (C. C. A. 9); *Caminetti v. U. S.*, 242 U. S. 470, at 495.

The modern law that a conviction can rest upon the uncorroborated testimony of a single accomplice was recently reaffirmed by this court in the case of *Catrino v. U. S.*, 176 F. (2d) 884. In the Allen case, there was the *corroborated* testimony of *two accomplices*, plus the independent testimony of more than a dozen witnesses.

There is the implication in appellant's brief that



the United States Attorney and his assistant entered into some sort of conspiracy with Judge Driver to accept a plea of *nolo contendere* from Keane and to give him a suspended sentence in exchange for his testimony (App. Brief pp. 84, 86). Without wasting the court's time in answer to such an argument, it can be said that the Government made no recommendation to the court as to the acceptance of a plea of *nolo contendere* and made no recommendation as to the sentence to be imposed upon the defendants. Under the system used in this District, that is the function of the court with the advice of the probation officer, which fact counsel for appellant well knew.

Appellant contends (App. Brief pp. 88-91) that the court erred in giving the jury additional instructions after they had deliberated for one evening and one full day. This court has passed upon this question in the case of *Charlton v. Kelly*, 156 F. 433, in deciding that the trial court has wide discretion in the matter of charging the jury, and may bring the jury in at any time and give them additional instructions, whether requested or not. Where the jury asks for additional instructions on a particular question, as they did in this case, it is clearly within the court's discretion, and not error, for the court to at the same time further instruct them on any issues. Also, in the case of *Allis v. U. S.*, 155 U. S. 117, at page 123, the court held:

“It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at



which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at the bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given."

Under the circumstances of this case, it was not error but the court's duty to give all instructions he believed necessary to answer the questions which troubled the jury. The foreman of the jury propounded the question as to whether or not Count I included the other counts. However, another juror spoke up and said that in starting to analyze Count I and subsequent counts that repetition and the duplicity of charges was confusing, and asked the court for help on behalf of the jury (R. 1264-5). The court thereupon, within its discretion, proceeded to aid and assist the jury in analyzing the counts and the elements thereof. The court prefaced his instructions as follows:

"I assume that there are two problems troubling you. One is whether or not the defendant is not charged seven times with the same offense, and the other is whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count." (R. 1269)

In concluding, the court very cautiously stated to the jury:

"I'll let you know now that all of the instructions that I gave you yesterday are in full force and effect, including the presumption of innocence, reasonable doubt, its definition, and all of the other things that I told you yesterday. You may now retire." (R. 1277)

It is submitted that the trial court's additional instructions were not complex, conflicting, contradictory and misleading, but were clear, cogent, concise and proper as to the law in the case, and it would have been improper for the court not to have assisted and helped the jury in its apparent quandry.

#### V. As to Inconsistency in Verdict (Appellant's Point V)

It is respectfully pointed out that the acquittal on the substantive counts and the conviction on the conspiracy count are not inconsistent. Conspiracy is the combining, confederating and agreeing to do a criminal act or acts, but it does not involve accomplishing the completed act. The substantive counts involve a completed fraud, whereas the conspiracy count is merely an agreement to swindle or defraud. Persons could very well conspire to do something and fail to accomplish it. In this case the jury might very well have believed that Allen combined, confederated and agreed with Keane and Grismer to embezzle and misappropriate moneys of the Pilot and Extension, but that he actually did not go so far as to commit the substantive offenses charged because of some intervening reason. The jury may not have been satisfied as to Allen's connection with the jurisdictional mailings set forth in the substantive counts or may have disagreed as to when Allen entered the conspiracy with relation to the dates of such mailings. Any number of consistent hypotheses can be imagined. However, as this court stated in the recent case of *Langford v. U. S.*, 178 F. (2d) 48 (Jan. 1950):

"We do not think the acquittal on the first count is inconsistent with conviction on the second count, but even if it were, consistency in the ver-

dict is not required.” (Citing the case of *Dunn v. U. S.*, 284 U. S. 390, and another of its recent cases so holding, *Catrino v. U. S.*, 176 F. (2d) 884 (1949).)

Also see: *Robinson v. U. S.* (C. A. 9, 1949) 175 F. (2d) 4.

It is useless to waste time discussing old cases. Since verdicts do not need to be consistent, each separate count of an indictment is now treated as a separate indictment, and an acquittal on one or more counts is no reason a conviction can not be had on one or more other counts.

In the case of *Troutman v. U. S.* (CCA 10) 100 F. (2d) 628, where the indictment, as here, charged violations of the Securities Act, the Mail Fraud Statute and the Conspiracy Statute, a judgment of conviction against one of the defendants found guilty only on the conspiracy count was upheld.

#### VI. As to Use of Conspiracy Charge for Procedural Advantage (Appellant's Point VI)

Counsel's argument is to the effect that Congress should repeal the conspiracy statute and not leave it as a weapon to prosecutors and law enforcement agencies. Of course the conspiracy statute has been used with the approval of the Federal courts many times. When the new Judicial Code was compiled by Congress and took effect in 1948, the conspiracy statute, instead of being eliminated, had an increased punishment, the punishment being raised from two to five years, so that Congress did have an opportunity to consider whether or not the conspiracy statute should be continued in the criminal code and decided upon giving it a position of increased importance rather than repealing it. (Title 18, U. S. C., Sec. 371)

No unfair procedural advantages were taken of the appellant. Since both of appellant's co-conspirators testified, the problem of using co-conspirators' statements made to third parties during the conspiracy as evidence against Allen does not appear in this case. His case was submitted to the jury under a fair set of instructions and the essential elements of the conspiracy outlined carefully by the Judge to the jury. We are in accord with all the cases cited by appellant under this assignment of errors which hold that the Government should use caution and care, but the evidence in this case clearly shows, as summarized by the trial judge, that Allen was a leading participant or a principal (R. 927-934). It is submitted that the evidence clearly shows conspiracy on the part of the appellant Allen and his acquittal would have been a miscarriage of justice.

Many assignments of error in this case have not been argued at all in appellant's brief, as required by the provisions of Rule 20 (f) of the rules of this court. This court has held that where no argument has been made in the brief on certain rulings on the evidence which are assigned as error, as required by the court rule, the Court of Appeals is not required to consider such ruling. *Martin v. Sheely*, (C. C. A. 9), 144 F. (2d) 754. Although in criminal cases the rule is that this court can notice plain error whether assigned or not, it is submitted that none of appellant's unargued assignments of error attain this importance.

## CONCLUSION

It is respectfully submitted that the evidence in this case properly demonstrated that the appellant Allen did enter into a conspiracy with others to misappropriate, divert and embezzle funds of the Extension Mining Company and the Pilot Mining Company and that the appellant did receive a fair trial before an impartial judge and jury; that the Court's instructions were proper and sufficient; that no errors which were prejudicial to the appellant occurred during the trial; that the verdict of the jury, rulings, judgment and sentence of the Court were proper in all respects.

Respectfully submitted,

HARVEY ERICKSON

*United States Attorney*

DONALD J. STOCKING

*Attorneys for Appellee*



United States  
Court of Appeals  
For the Ninth Circuit

JAMES ANTHONY ALLEN,  
*Appellant,*  
*vs.*  
UNITED STATES OF AMERICA,  
*Appellee.*

REPLY BRIEF OF APPELLANT

*Upon Appeal from the United States District Court,  
Eastern District of Washington,  
Northern Division.*

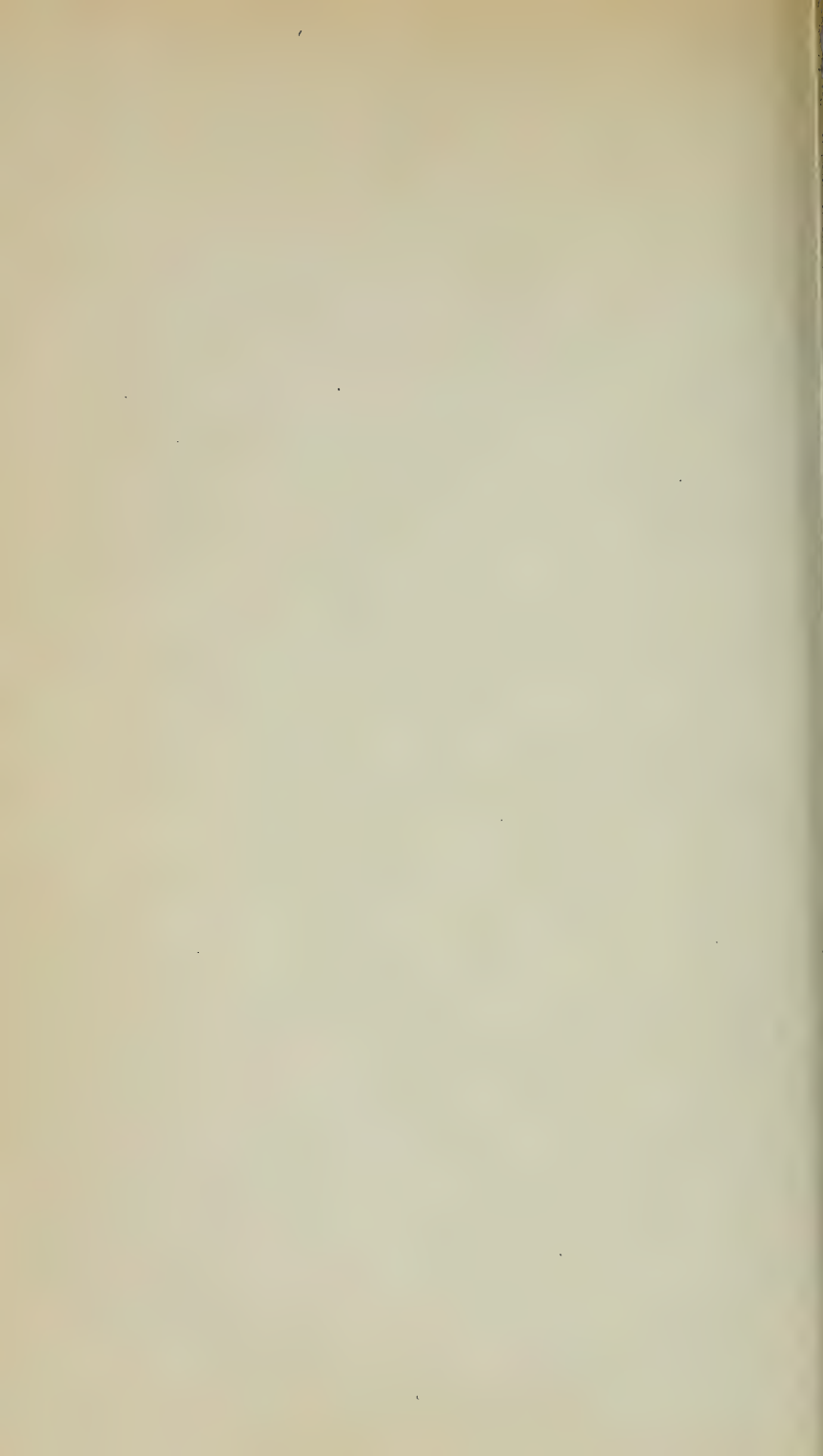
R. MAX ETTER,  
WILLIAM E. CULLEN,  
726 Paulsen Building,  
Spokane, Washington.

THERRETT TOWLES,  
1231 Old National Bank Building,  
Spokane, Washington.

J. F. EMIGH,  
55 West Broadway,  
Butte, Montana.

JAMES A. MURRAY,  
1624 Eye Street, N. W.,  
Washington, D. C.,

*Attorneys for Appellant.*



United States  
Court of Appeals  
For the Ninth Circuit

---

JAMES ANTHONY ALLEN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

No. 12437

---

REPLY BRIEF OF APPELLANT

---

Under the subject "Pleas" page 2, Brief of Appellee, it would seem that counsel for appellee are putting forth an effort to lead this Court to infer from the proceedings had on March 21, 1949, that the reason Allen withdrew his plea of *nolo contendere* and entered a plea of not guilty to all counts of the indictment was the statement of Judge Driver to the effect that a penitentiary sentence could be imposed. The advancement of this contention loses sight of matters which in part appear of record, but are not made clear to this Court as they were to Judge Driver at the time Mr. Emigh addressed the Court as to the rule that the Court would apply in relation to the imposition of sentence under a plea of *nolo contendere*, that is, whether the Court would follow the common law rule and

treat the case as being a violation of regulatory statutes or the rule prevailing in the Ninth Circuit that any sentence which might be passed upon defendant under a plea of guilty might be imposed.

The Court had previously stated that it had the benefit of a pre-sentence investigation report prepared by the probation officer as to each of the three defendants (R. 59). However, an examination of the Record relating to the withdrawal of Allen's plea of not guilty and substitution of the plea of *nolo contendere* discloses that Allen's side of the facts of the case had not been presented to the Court as had been done in relation to the defendants Grismer and Keane (R. 27-68). But it does appear from the Record that Allen was motivated in withdrawing his plea of *nolo contendere* by matters not appearing in the Record. It will be noted that on page 56 of the Record, Judge Driver on January 13, 1949, before accepting Allen's plea of *nolo contendere* made the following statement:

"I think the record may show that a conference has been held in chambers regarding this matter prior to this session, in which counsel for the defendant and the United States Attorney were present, so it isn't necessary for you to repeat here in detail, Mr. Etter, your reasons for submitting this plea."

It is further noted that at page 62 of the Record, Judge Driver in commenting upon defendant Allen's application for leave to enter a plea of *nolo contendere*, said:

"defendant Allen came in by counsel, and I

thought made the logical contention that he shouldn't be by implication singled out as the one villain of the piece here, and that if the others were permitted to enter a plea of *nolo contendere* he should do so also, and I think there was a suggestion made at that time that he would like at that time, or wished to have a conference in which he'd present his side of it, and have the defendant Keane present his case to the probation officer, and thrash the whole thing out, and that seemed to be acceptable at that time. On further thought it seemed to me that was not the proper way to proceed here, that we shouldn't have an informal hearing of the matter before the probation officer; I could see where there might be difficulties and that that wasn't desirable, and we decided that that should not be done." (R. 62.)

Keane had been permitted to, and had by counsel set forth a long dissertation upon his profession, his inebriacy, and all other excuses which his capable attorneys could bring before the Court and very much therein begged leniency on the grounds that he was a dupe, an incompetent, and a victim of others, and because of his physical and mental condition he could not entertain the necessary intent, which is the gist of the offense charged (R. 27-48). Grismer, appearing by his attorney, also advanced reasons why he did not entertain the necessary intent so that leniency be granted to him (R. 49-54).

When defendant Allen applied to withdraw his plea of not guilty and substitute a plea of *nolo contendere*, there was an understanding that he should be permitted to present the facts which he relied upon to prove that there was not any criminal intent or conspiracy



on his part, and at that time government counsel stated to the court that if Allen would withdraw his plea of not guilty and enter a plea of *nolo contendere* to the first six counts of the indictment, the government would move to dismiss the seventh count, which is the conspiracy count (R. 55). It appears that the Court, at the request of the District Attorney, after accepting this offer on Allen's part to fully present his side of the facts, canceled the proposed conference because "the court could see where there might be difficulties and that wasn't desired," and this was not made known to Allen or his counsel until the time set for hearing on the *nolo contendere* pleas of all three defendants. This is wholly without reflection upon Judge Driver as he fully made his position clear a short time later (R. 63).

However, it is clear that, when Allen withdrew his plea of not guilty and tendered a plea of *nolo contendere*, he felt that under all of the circumstances he would have an opportunity to fully present his position in relation to the charges made against him, much as the other defendants had done. It is equally true that when he withdrew his plea of *nolo contendere* such opportunity had not been afforded him. We think it may be fairly inferred from the Record that Allen considered when withdrawing his plea of not guilty he would have a fair opportunity before the Court passed judgment to present fully, through the probation officer, to the Court the facts which he relied upon as a defense, and the fact that he had never been charged criminally before in any action, and that he

might fairly anticipate that he would not be singled out as a scapegoat to bear punishment for the crimes of Keane. The only way defendant Allen could bring before the Court the facts of the case and not be presented in the light of a villain practicing his villainies upon an incompetent, innocent attorney and an unfortunate prospector was to stand trial on the indictment, and it may be well noted from the facts before the Court, and we will repeat that counsel for the government was ready to dismiss as to Allen the only count upon which he was convicted, viz, the conspiracy count (R. 55).

Answering what is entitled as the Conspiracy Count on pages 3 and 4 of Appellee's Brief there is recited both the essential and non-essential elements of the conspiracy count and then it is stated that the sales of stock of Extension and Pilot were made to the public on the representation that the proceeds would be used for development of the mining properties owned by them and the conclusion is drawn without reference to the Record:

1. That Allen and Keane were promoters of these companies, whereas the government itself proved by its witness attorney Johnston, who prepared the prospectuses of these two companies that Allen was not a promoter of either of these companies according to information furnished him by Keane and Grismer, the latter advising the SEC that Allen was not a promoter and the statements in the prospectuses are at-

torney Johnston's conclusions from all the facts he could gather (Appellant's Brief, pages 23-24). In fact, John Sekulic, president of Big Friday, of which Keane, Horning and Judge Featherstone were also directors, was the promoter with Keane of Extension (Grismer, 384-387, 443, 464-466, 469, 480-481; Horning, 263, 275; Emacio, 994; Keane, 709, 712-713; Vermillion, 230). While Sekulic was under subpoena by the government, for some unexplained reason he was not called as a witness by it.

Allen's contention was that he was in no manner responsible for any statements made in the prospectuses of Extension and Pilot, and there is no evidence that Allen had anything to do with any financial arrangements concerning underwriting agreements (Morphew, bookkeeper for Edwin LaVigne & Co., 527; Nolting, for E. J. Gibson Co., 509; O'Brien, for Pen-naluma & Co., 536; Redfield, 530).

2. That Allen and Keane embezzled and diverted a large portion of such proceeds to their own use and benefit, whereas Keane as attorney for Extension, as president of Pilot with his stenographer as vice president, and as president of Montana Leasing Company, handling all funds and issuing all checks, embezzled the funds of Extension and Pilot, and for the embezzlement of Extension funds Grismer as president endeavored to have the State court of Idaho prosecute him for such crime (Brief of Appellant, pages 5, 6 and 40). See also Randall's audit of Extension and Pilot (Deft's Exs. T and U, Appellant's Brief, page 7).

3. It is further stated that after these diversions, Allen and Keane unloaded large quantities of stock on the investing public, whereas not a single investor was called as a witness against Allen and in fact Allen's sales of Extension and Pilot stock, acquired from Grismer, were made more than a year after the original issues of stock of these two companies to the public and on an unsolicited broker's bid for the broker's own personal account (Brief of Appellant, pages 20-22).

Government counsel discuss on page 5, Appellee's Brief, diversions from Extension funds. The statement therein contained that Montana Leasing and its successor, Lexington Silver-Lead, were wholly owned and controlled by defendants Allen and Keane is misleading and erroneous. Allen's interest in these companies was because of the Delaware investment, the Lexington Mining Company investment owning Lexington Mine, and his personal investment. Allen had charge of the mining operations of Montana Leasing only. Prior to December 26, 1946, when Allen became president of Lexington Silver-Lead, Keane handled all legal work and financial transactions (1109-1110, 1022, 1029, 1056, 1057, 1059, 1064, 1108, 1113).

If the Court will analyze Plaintiff's Exhibit 120 of checks of Montana Leasing and Lexington Silver-Lead signed by Allen from July 2, 1945, to August 31, 1946, it will find that, out of 260 checks totaling \$49,327.91 (Appellee's Brief, page 13), approximately \$6,300 was properly chargeable to Allen's personal account, nearly \$20,000 was chargeable to mining ex-

pense, and about \$4,600 was chargeable to travel expense. Allen put more money into Montana Leasing and Lexington Silver-Lead than he received from sale of stock or what he had drawn out chargeable against his personal account by about \$80,000 (R. 1167).

As to diversion of Pilot funds, government witness Vermillion, who had worked for Keane for five years (R. 226) stated emphatically that Allen had nothing to do with the financial transactions of Pilot (R. 225). Porter, who testified Keane had been his attorney since 1936 and who was hired by him to organize War Eagle Mining Company (998-999), stated that in negotiating a loan from Keane he never discussed the matter with Allen, Allen had nothing to do with his securing the loan, and that neither Keane nor Allen had or now have any interest in War Eagle (1002-1003), contradicting Keane's testimony that Allen, Keane and Porter each owned a one-third interest in War Eagle (Brief of Appellee, page 15, and Keane's testimony at R. 655). Vermillion's testimony that War Eagle checks of \$1200 on Pilot funds were prepared by her pursuant to Allen's instructions is in direct contradiction of her testimony that Allen had nothing to do with the Pilot financial transactions, and contradicted by Porter (R. 998-999).

The statement on page 7 of Appellee's Brief that Independence advanced large sums of money for joint enterprises of Keane and Allen is misleading and erroneous for the reason that checks of Independence



to Allen to June, 1943, were loans to Lexington Mining Company secured by mortgage and for Lexington payrolls, repaid to Keane personally, as he requested, for Independence (Pltf's Ex. 125) and total checks paid back to Keane, president of Independence at that time, amounted to \$29,408.88, was not controverted.

The testimony shows, and it has not been controverted, that when Keane settled the Independence-Marquardt-Kingsbury lawsuit in June and July, 1946, with attorneys Horning, Hull, Langroise and Keane's law partner McCann, there was about \$40,000 drawn out of Pilot, as the audit shows (R. 1147-1148).

The Court's attention is called to the fact that the government deliberately failed to show a schedule of the withdrawals from Montana Leasing and Lexington Silver-Lead accounts made by Keane to other companies or individuals or to himself personally.

Referring to the statement in Appellee's Brief, page 8, on diversion of \$10,000 of Extension funds to Delaware, that Allen had French fill in the Extension checks Nos. 8 and 9 (Pltf's Exs. 6a and 6b) is false and erroneous. French testified she had no independent recollection of Allen being in her office August 7, 1945 (R. 338, Pltf's Ex. 34). Government counsel have gone outside the Record and attempted to inject into it evidence that is not there. French did not testify that Allen had her deposit the \$10,000 Extension check to Delaware account, nor did she testify that she filled in the \$5000 Extension check (6b) or paid Callahan

Consolidated \$6000 or paid Walter Hanson \$1000 at Allen's direction as stated on pages 9 and 11 of Appellee's Brief, and the statement on page 12 of Appellee's Brief that the August 28, 1945, check for \$5000 was prepared by Allen is absolutely false and has no foundation in fact.

The government deliberately did not produce Donald A. Callahan, president of Callahan Consolidated Mines, or Walter Hanson, Wallace attorney, even though both were available, and, further, it will be noted that Vermillion did not produce her notes wherein she claimed her memo was made on August 7, the date Keane supposedly was near Avery on a fishing trip with John Sekulic, which is about an hour's drive out of Wallace, and there is no evidence that he remained at this spot all day on August 7 with the same Sekulic mentioned in *Independence Lead Mines vs. Kingsbury*, 9th Cir. 175F. 2d 983.

It will be noted that Vermillion kept blank Delaware checks signed by Allen in their safe (R. 224). McLean testified that Delaware blank checks signed by Keane were left with her, and that she had done work for Keane (R. 329).

A further hypothesis as to the innocence of Allen can be given to the above transactions when considering Vermillion's testimony, and that if she were such a loyal servant to Allen, why didn't he have her complete these alleged transactions? She and Keane had

written every other check for withdrawal from the Extension and Pilot bank accounts.

Allen's testimony is to the effect that his only requests to Vermillion were with reference to stock certificates from the Grismer stock after he had acquired it from Grismer, and that was in September or October of 1945 (Vermillion R. 1090, Pltff's Ex. 67, 67a). And when Allen did ask her to see financial records of the Lexington Company she stated "my instructions are to give you nothing" and that her instructions would come from Keane first and that she would have to carry out Mr. Keane's instructions (Allen R. 1063).

Allen further denies ever seeing any financial statement or checks concerning Lucky Friday Extension until about January 15, 1949, and that was in the District Attorney's office (Allen R. 1060).

Each one of the six substantive counts of the indictment charged Allen with diverting the funds of Extension and Pilot and on each of these six counts he was acquitted.

So far as Vermillion's testimony with respect to these checks is concerned, she was under Keane's domination and her credibility for truth and veracity was definitely impeached by a report to the Department of Licenses of the State of Washington, sworn to by her on May 1, 1946, that Extension for the year ending December 31, 1945, had \$51,077.92 cash on hand (Deft's Ex. a), whereas Extension bank statement showed a balance on (Saturday) December 29, 1945, of \$9,333.92

and on January 3, 1946, \$7,047.92 (Deft's Ex. B, R. 245-246). She was in a position with Keane where she could not have honestly made such a mistake and she testified that she herself obtained the December, 1945, statement from the bank (R. 254).

French's testimony disproves Vermillion's testimony that Allen was standing by French when the Extension checks were handed him (R. 167).

At this point we call the Court's attention to the fact that Appellee's Brief is wholly devoid of any reference to Keane's excuses for his conversions covered by pages 8 to 12, inclusive, of Appellant's Brief, nor to his forging of Allen's name to the \$60,000 production note of Montana Leasing to Independence (Deft's Ex. M) and the J. A. Hogle Co. check of \$6,872.95 payable to Allen (Pltf's Ex. 105, R. 1077, 1091-1093, 1164-1165).

On the subject of the diversion of \$15,000 of Pilot funds to Coeur d'Alene Consolidated: government counsel base their whole argument in an effort to connect Allen with this transaction on an erroneous statement of facts. The \$40,000 check of E. J. Gibson & Co. payable to Pilot, covering proceeds from sale of Pilot stock (Overt act 8 of Seventh Count of Indictment) is stated to be dated May 23, 1946, as Ex. 31-A. As a matter of fact it was on this date that Keane made Allen and Grismer president and secretary-treasurer, respectively, of Coeur d'Alene Consolidated, and naturally it would be to the advantage of the prosecution

to have this check dated as of May 23, 1946, and thus delivered to Allen as of that date as president of Coeur d'Alene Consolidated. But such are not the facts.

This check is Pltf's Ex. No. 13 and is dated May 20, 1946. To and including May 22, 1946, Keane was president of both Pilot and Coeur d'Alene Consolidated, then why would the check be delivered to Allen? Allen testified he never saw this \$40,000 check until it was in the district attorney's office and that he did not deliver it to Keane (1088-1089). The attempt to connect Allen with this transaction is disproved by what actually occurred when this check was delivered to Keane.

Pltf's Ex. 37 is a bank deposit slip dated May 22, 1946, crediting Pilot account with the following:

	\$40,000
F. C. Keane -----	20,000
	<hr/> \$20,000

Pltf's Ex. 36 is a bank deposit slip dated May 22, 1946, crediting F. C. Keane's account with the following:

\$10,000
5,000
<hr/> \$ 5,000

Pltf's Ex. 38 is a bank deposit slip dated May 22,



1946, crediting Coeur d'Alene Consolidated's account with

\$25,000

with notation: Wallace, Idaho—No withdrawal subject to escrow agreement between this Co. and C.d'A. Mines.

Keane made these deposits in the bank (R. 626). Pltf's Ex. 31 is a \$10,000 check of E. J. Gibson Co. dated May 21, 1946, to attorney Gyde and Pltf's Ex. 31-a is a \$4500 check of E. J. Gibson Co. dated May 23, 1946, to Gyde. Keane took these two checks to Gyde's office; Gyde endorsed them and at Keane's request gave them to Keane (R. 281-283). Pltf's Ex. 36 represents the deposit to Keane's personal account of \$5,000 of the \$10,000 check.

For further facts on this score see Appellant's Brief, pages 22, 23, and 29.

The diversion of Pilot funds to War Eagle and of Pilot money to Independence has been heretofore mentioned in this brief and in Appellant's Brief as to Independence advances at page 17.

As to sale of Extension and Pilot promotion stock: In a further effort to connect Allen with Extension attorney fees' stock, government counsel indulge in a further erroneous statement of facts as to what Johnston testified. The substance of Johnston's testimony is clearly and briefly given in Appellant's Brief, pages 28-29, and we call attention to another mistake at top of page 17 of Appellee's Brief as to the amount of stock returned by Johnston to Keane.

On page 17 of Appellee's Brief, it is stated that 60,000 shares of the 425,000 shares of promotion stock were sold in the names of J. A. Allen and Helen Jorgenson for \$13,410.20 (Ex. 114) and that this money went to Allen. This is not true because it has already been shown that 35,000 shares of this stock were sold by Keane who forged Allen's name to the check for \$6,872.95 of J. A. Hogle & Company.

The stock transactions referred to on pages 17 to 19 of Appellee's Brief are fully covered in Appellant's Brief on pages 20 and 21, and in Allen's testimony (R. 1137-1140).

The financing of Montana Leasing and Lexington Silver-Lead by Independence, as discussed in Appellee's Brief, page 19, under the heading "Background of Allen's Part in the Promotion of Extension and Pilot" is fully discussed in Appellant's Brief commencing with page 14 under the heading "Record Evidence Disproved Keane's Testimony as to Financial Condition of Montana Leasing in Spring of 1945" and these facts prove the falsity of Keane's claim that it was because of the financial difficulties of Montana Leasing that he and Allen were to promote the Extension for the purpose of *bailing out in Montana*.

It was not because of a civil injunction against Allen that Grismer was made to appear as a principal promoter of Extension because the citation to the Rec-

ord, pages 612 and 614, does not bear out such a statement. As to the statement that Allen advised Keane that he had acquired Extension ground from John Sekulic, it will be noted that the government failed to produce John Sekulic, president of Big Friday, and it will be further noted from the Record that John Sekulic, Horning, Keane and Judge Featherstone, all directors of Big Friday, were the actual promoters of Extension for which they received very substantial blocks of stock of Extension, and because of the financial assistance given to Big Friday by Extension, that Sekulic, Judge Featherstone and Horning each made over \$50,000. By the testimony of Grismer and Vermillion it is shown that Judge Featherstone and Horning shared in Sekulic's Extension stock (469, 481, 230) and that the contract between Big Friday and Extension enhanced the value of Big Friday's stock so that it increased from 20 cents per share to \$1.75 per share, and 150,000 shares of Big Friday stock, of which 50,000 shares each were owned by Judge Featherstone, Horning and Sekulic, were sold at a price of a little over one dollar per share (Keane, 716-718; Powers, R. 1015-16-17, and Deft's Ex. V).

The true facts, and it is borne out by the Record, are that the Big Friday was in financial difficulty and unable to proceed further with the development of its mine. It was indebted to its president John Sekulic in the sum of \$10,000 (Emacio, R. 993, 994, 996), and it was Horning, Keane and Featherstone that formed the

Extension Company for the development of Lucky Friday and Extension ground, and not as Keane stated to "bail out in Montana."

The Record conclusively shows further that Keane, in September and October of 1945, during the negotiations of the supplemental agreement between Extension and Big Friday and Hunter Creek was *not in a Conspiracy* with Allen, and this is proved by the testimony of Horning (R. 263):

"The Extension Company as I understood it in the meantime had issued their prospectus which didn't call for sinking. Mr. Keane's idea was that they might get in bad with the SEC if they now signed that supplemental agreement and agreed to go to the expense of sinking 400 feet, where they hadn't announced in the prospectus they were going to. Mr. Allen felt that since they were doing more work than the prospectus had said they were going to do, that the SEC couldn't have any objection."

It must be inferred from the Record that a great portion of Allen's time was spent in Wallace, Idaho, in connection with his supervising the operations and the construction of the Callahan mill, and not that he deliberately came to Wallace on August 6 and checked out on the 8th, and again on the 27th and checked out on the 30th. Also, it will be noted that Keane did not have an alibi as to his whereabouts on August 28, excepting that Allen was registered at the Samuels Hotel on that date with C. O. Dunlop, president of Hunter Creek (Pltf's Ex. 77).

As to Allen's promoting the Pilot: the consent decree (Pltf's Ex. 121) entered in June, 1943, by Allen, Messrs. D. A. Callahan, W. F. McNaughton and Dr. T. R. Mason, as directors of Lexington Mining Company, because of a technical violation on behalf of the corporation in selling its once SEC registered Callahan shares, this injunction would have expired a mere 12 days after the public offering of Pilot. Therefore, if Allen were the dominant factor in Pilot, wouldn't it be reasonable that he would have waited this 12 days at which time the civil injunction would no longer have any force or effect?

Grismer testified that Allen's central development project for the development of the Alma, Hunter Silver-Lead, Hunter Creek, Idaho Silver, Big Friday, Extension, Pilot and Gold Hunter was the *nucleus* of the whole thing (R. 451). This is borne out by the witnesses, Herrick, Phalen, Johnston, Lakes, Porter and Allen.

All of which is conclusive that there was no criminal intent or conspiracy on the part of Allen to obtain money or property from investors for the purpose of bailing out in Montana, but, on the contrary, it is shown by the Record as a whole, that the object of Allen was for the development of mining properties in which he has successfully been engaged for the last 15 years.

We submit that the defendant could not and did not have a fair trial under an indictment such as the pres-



ent one where the evidence to support such an indictment was a hodge-podge of exhibits, some confessedly forged, many of which did not prove anything in this case but all of which were thrown into the lap of a jury of laymen who could not possibly review them all in a week's time; and on top of this a prolixity of instructions were given which defy the mind of a trained lawyer to apply.

In this particular case it is clear the jury did not believe that Allen had committed any of the acts charged in the first six counts, and the evidence was identical and the same in the seventh count and based upon testimony of the most unreliable kind. It should be borne in mind that Allen was not being tried for embezzlement; that there is no adequate evidence of a conspiracy on his part to violate the various statutes involved in the indictments, other than such evidence as may be found tending to prove the commission of overt acts charged in the first six counts, which the jury has said were not proven. That the jury could not apply the Court's instructions and did not understand them is evident by the questions propounded by the jury when called into court. The jury was entitled to a plain, concise answer to this question.

The defendant had the right to have the jury's question answered in plain and concise language.

We submit that the defendant's right to a fair trial was certainly prejudiced by the Court "assuming"

that some other question was troubling the jury and the court then giving to the jury another voluminous set of instructions accenting the government's cause, and tending only to leave the jury more confused, if anything, than when they asked a simple question of the Court.

For the reasons hereinbefore stated in this 'Brief, and for the reasons stated in the Brief of Appellant in this case, we urge that the judgment of conviction and commitment of defendant and appellant Allen should be reversed.

Respectfully submitted,

R. MAX ETTER,

WILLIAM E. CULLEN,  
726 Paulsen Building,  
Spokane, Washington.

THERRETT TOWLES,  
1231 Old National Bank Building,  
Spokane, Washington.

J. F. EMIGH,  
55 West Broadway,  
Butte, Montana.

JAMES A. MURRAY,  
1624 Eye Street, N. W.,  
Washington, D. C.,

*Attorneys for Appellant.*

JAMES ANTHONY ALLEN.

IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JAMES ANTHONY ALLEN,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

PETITION FOR REHEARING

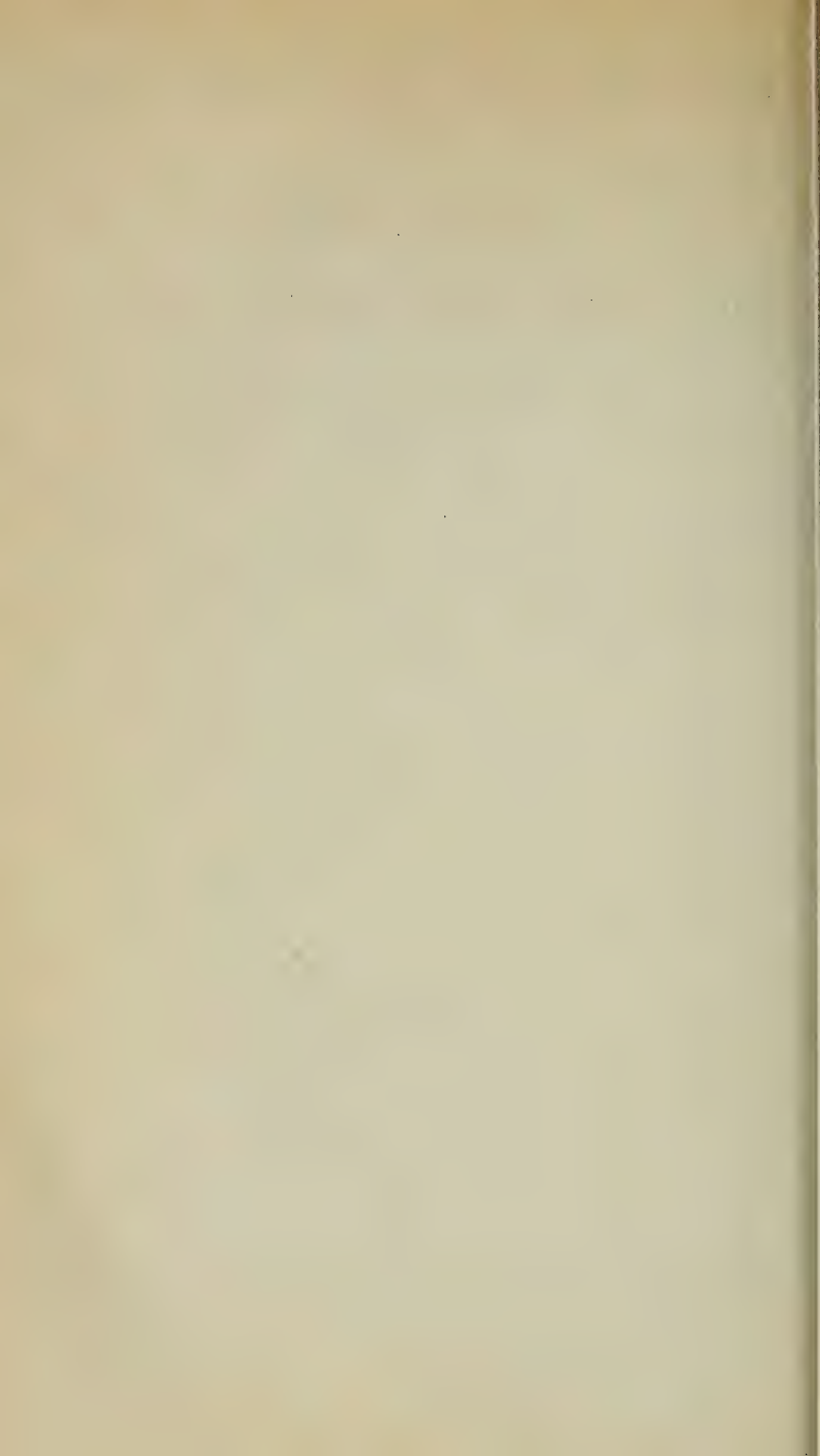
---

*Upon Appeal from the United States District Court  
Eastern District of Washington  
Northern Division*

---

R. MAX ETTER,  
WILLIAM E. CULLEN,  
726 Paulsen Building,  
Spokane, Washington.

THERRETT TOWLES,  
1231 Old National Bank Bldg.  
Spokane, Washington,  
*of Counsel for Appellant.*



IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JAMES ANTHONY ALLEN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

PETITION FOR REHEARING

---

*Upon Appeal from the United States District Court  
Eastern District of Washington  
Northern Division*

---

R. MAX ETTER,  
WILLIAM E. CULLEN,  
726 Paulsen Building,  
Spokane, Washington.

THERRETT TOWLES,  
1231 Old National Bank Bldg.  
Spokane, Washington,  
*of Counsel for Appellant.*

---





IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JAMES ANTHONY ALLEN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

PETITION FOR REHEARING

---

Appellant respectfully prays that this cause be reheard and reconsidered, and prays for a reconsideration of the opinion filed herein January 4, 1951, by reason of all the records and files herein and because of the following points in which the appellant believes that the Court fell into substantial and serious error on the legal and factual issues involved and presented by the appeal in this cause:

I.

Consideration of the whole record discloses that appellant Allen's association with Keane was not conspiratorial as charged in the indictment but that, in fact, it was an unavoidable incident of the appellant's

legitimate position and pursuits in the development of the Mullan mining area.

The opinion of the Court holds that there was much evidence *apart* from the testimony of Keane and Grismer, *tending to prove* that Allen actively participated in the alleged fraudulent enterprises. We respectfully desire to review certain portions of the record in that regard. Our purpose in this review will be to avoid repetition but to point out to the Court that the tendency of the evidence taken as a whole supports the appellant's contention that his conviction has not resulted from active association and active participation in illegal and fraudulent schemes. It is the position of the appellant that a mere association or affiliation is insufficient to mark appellant as a conspirator and that the evidence must prove beyond reasonable doubt that appellant adhered to and knowingly furthered an illegal conspiracy.

It is the position of the appellant, aside from any argument of inconsistency in a verdict, that his acquittal on the six substantive offenses charged left nothing for the jury to pass upon. We respectfully repeat that the question does not concern inconsistency alone, but relates to a situation where the same acts and proof requiring the same intent and unity of operation were held insufficient to convict appellant on six counts but sufficient to convict appellant of a count of crime, the proof of which must have necessarily

been assumed solely from association. The jury was convinced that no personal guilt of substantive offense attached to Allen and the conviction on the conspiracy count, in our opinion, violates the fundamental principle that guilt is personal and does not arise from the actions of others. (See *Bridges v. Wixon*, 326 U. S. 135.)

Before reviewing what we deem to be pertinent portions of the record we repeat again that the testimony of Keane, Grismer and Vermillion is not entitled to credence in view of the close and important decision that must be made and which will effect appellant Allen's future career. In view of Allen's acquittal of six counts in the indictment by the jury, it seems that any testimony by Keane, Grismer or Vermillion serves to attempt to deprecate that judgment, and should thus be entitled to very little weight in this Court.

First, as to Grismer—we respectfully direct the Court's attention to the appellant's opening brief at page 108. There is found a statement made by Grismer at a stockholders' meeting of Pilot on August 7, 1948, which is completely and entirely at variance with any theory of conspiracy at all. The statement, if this Court please, is much more important in this case in view of the fact that it was made by Grismer several months after an indictment had been returned against him, and at a time when he surely must have known the possible consequences of the statement which he made.

Second, as to Vermillion—it is noticeable in her testimony (Tr. p. 148 et. seq.), that she dutifully and zealously answered questions with an undeniable stock answer; queries directed at her implying participation in crime as they related to the defendants, were always answered “Mr. Keane and Mr. Allen.” Nevertheless, the motive and interest of the witness certainly appears in her activities concerning the filing of a false statement with the State of Washington (Tr. pp. 243-248, incl.). If there is any doubt of motive and interest on the part of Vermillion after the evasive answers given by Vermillion, then it appears in other parts of the record where the association of most of the important government witnesses in mutual interests hostile to Allen, appears. The individuals in Wallace, Idaho, involved in these transactions were bound in a close-knit organization. Witness Vermillion was Keane’s secretary and likewise the court reporter for Judge Featherstone who was, in turn, a fellow director of mining enterprises with witness Horning and witness and defendant Keane (Tr. pp. 673, 674; 717 et. seq. & etc.). Furthermore, although we desire to avoid repetition in this petition, we believe it is most urgent for this Court to consider whether or not a conspiracy existed during this trial between the various cronies from Wallace, Idaho, who profited from many of the transactions in which Allen is accused of being the moving party. The testimony of witness Emacio indicates, as well as Keane’s testimony heretofore referred to, that



certain individuals in Wallace, Idaho, profited greatly, and this in contrast to the undeniable fact that Allen profited not at all on any of these transactions.

Now we come to Keane—very little will be said about Keane because this Court is familiar with his activities and depredations which are indicated in the record of this case and in other matters which have been before this Court. We submit that the truth is a stranger to Mr. Keane.

## II.

Now, turning to the Court's consideration of the evidence, which the Court has held, apart from Keane, Grismer and Vermillion, to be sufficient, as tending to show Allen's illegal participation. There appears the conversations with Elmer Johnston, a Spokane attorney, and the Court imparts considerable importance to this circumstance. We would like to direct the Court's attention to what appears to us to be the reasonable picture and explanation of appellant Allen's association with Johnston. Mr. Johnston's recollection was that in the spring or summer of 1945 Allen discussed his project of deep development and his testimony indicates that such a development was Allen's only interest in that area (Tr. pp. 581-583, inc.). It further appears that interests represented by Mr. Johnston paid Allen a considerable block of stock for his work in negotiating with several companies involved in the deep development project and his testi-

mony indicates that Mr. Allen thrashed out the repeated rows and fights (Tr. pp. 588, 589). The stock payment indicates Allen performed valuable services. In our opinion, the matter of the injunction was not a furtive thing in any negotiations Mr. Allen had with Mr. Johnston (Tr. pp. 591-594, incl.). Likewise it appears that Johnston's opinion, and this was certainly his opinion after the conversations which he said he had with Allen, was that he was convinced that Keane was dominating and controlling the promotion of the companies involved in this cause (Tr. pp. 596-598, incl.), and it likewise appears that Mr. Randall, the accountant, was not acquainted with any purported activities of Allen by way of promotion (Tr. p. 598). Likewise, it should be pointed out that although Allen has been charged with secretly assisting and aiding in the promotion of Pilot Silver Lead, it appears from the record that the civil injunction against Allen would have expired only twelve days after the first issue of Pilot. It seems reasonable to suggest that Allen, if he exercised any control, direction or participation in Pilot, could have easily waited twelve days until the injunction expired and then commenced to promote Pilot profitably without being under any legal prohibition of any kind (Tr. pp. 1102-1103, incl.).

There can be no doubt at all that Keane made huge diversions from Pilot and Lucky Friday, and records of which this Court will take judicial notice indicate that these were not the first diversions Mr. Keane had

ever made from companies of which he was an officer. His activities in Independence years before indicated the source of his capital for joint ventures upon which he embarked. It is with very little wonder that we note the trial Court's reference to Mr. Keane as "the evil Mr. Keane" (Judge Black, Tr. p. 906); the statement that Keane was "confessedly evil" and the description of his activities as "those evil acts of Mr. Keane's." The defendant Keane was guilty to an absolute certainty (Tr. p. 1290) and his conversion was admitted (Tr. p. 663). The defendant Keane was certainly guilty of forgery (Defendant's Exhibit M. Plaintiff's Exhibit 95; Tr. pp. 1075, 1076; Plaintiff's Exhibit 105, Tr. p. 824; Tr. pp. 1076-1078, incl.; 1092). This description of Mr. Keane is not entirely complete but it is repeated in connection with our objective to determine, whether or not, there is a completely reasonable justification for appellant Allen's conviction on one count. It is in furtherance of our premise that including or aside from the testimony of Keane, Grismer and Vermillion, the facts indicated a situation as to Allen, which is consistent with his innocence, not his guilt.

Allen was interested in the Montana property and that fact is not denied. The facts indicate that Allen and Keane put money into Montana Leasing, and it would seem that if Allen was engaged in a conspiracy with Keane he would have allowed the companies which Keane organized and controlled to finance the entire

undertaking rather than expend funds of his own. The fact that Allen made withdrawals from Montana Leasing in no way tends to indicate complicity in crime, when it is noted that Allen put \$80,000 more of his funds into the venture than he ever realized from any source, in stock, or otherwise (Tr. p. 1167). We have already shown that Allen's sales of stock were made at far below a price where he could have advantageously engaged in the conspiracy had he been an active participant in the bilking. Likewise, after Allen and Grismer threw Keane out of the companies in accordance with the recital of Grismer, heretofore set out in this argument, Allen personally advanced additional moneys to attempt to maintain the companies involved (Defendant's Exhibit BB; Plaintiff's Exhibit 18, Tr. pp. 1071-1074, incl.). Keane originally had advanced moneys out of Independence which Allen paid back (Tr. pp. 1123, 1124) and it seems most reasonable that in a joint venture of this kind Allen could assume that Keane had authority to advance moneys from Independence, and it is further reasonable to assume that in a situation where Allen had no control over the companies involved in this action, he could not be charged with knowing that Keane had changed his source of contribution (Tr. p. 1124), and nowhere is it suggested that Allen had any participation whatsoever in the \$40,000 which came out of the Pilot and then went into Keane's account and thence out to vari-



ous attorneys interested in the Independence litigation (Tr. pp. 1121, 1122; 1147, 1148).

The foregoing then outlines what we believe to be the pertinent support for our position in this appeal as follows: (a) Allen contributed his own funds to his mining operations in Montana. (b) He had contributed his own funds to such an operation prior to the time of Keane's defalcations and had honored his obligations. (c) He had no part in the withdrawal of the large sum of \$40,000 which would indicate Keane's own independent personal activity from the beginning and throughout the transactions. (d) His arrangement with Grismer for acquiring stock was in no wise irregular, for had Allen conspired in the beginning he would certainly have acquired the stock and engaged in private selling for personal profit.

In view of the above and foregoing we come to the matter of the checks issued by the Delaware Mines Corporation. The Court's opinion says that Allen's participation is circumstantially confirmed by Allen's presence in Wallace and Keane's absence on a fishing trip. Mrs. French had no independent recollection with respect to Allen's personal connection with the checks in question and in fact her testimony disputed Vermillion's in part (Tr. p. 167; Appellant's Reply Brief, pp. 9, 10). We cannot say, nor do we know of Keane's physical presence in or out of Wallace on the day in question. We do know that blank checks of Delaware,



signed by Allen and Keane, were kept by Vermillion (Tr. pp. 324-329, incl.), and we do know that Keane had proved his adeptness at forging Allen's name. In view of all the above and foregoing, it is a reasonable hypothesis to assume Keane's connection with the disputed account and checks.

The Court's opinion concluded that appellant Allen did not give a reasonable explanation, nor did he deny the circumstantial facts attempted to be shown by the Government in the above transaction. We should like to point out, however, that in view of Keane's forging activities, the situation created was a situation which could not be met by certain denial. We offer no lame excuses in making such a statement for the very important reason, that had it not been for a fortuitous circumstance in the identification of Keane's writing of the words "J. A. Allen," Allen would likewise have been charged with negotiating the sale of stock to J. A. Hogle & Company in Butte and receiving funds therefor. The Government called the witness F. C. Greene, who was manager of a stock brokerage office in Butte, and who testified as follows on direct examination:

Q. Do you know Mr. James A. Allen?

A. Yes, sir.

Q. Is this the Mr. James A. Allen—

A. Yes, sir.

Q. —with which you had the transaction? Now,

Mr. Greene, what was the nature of that transaction?

A. I don't remember any details.

\* \* \* \*

Q. Mr. Greene, I'll hand you Plaintiff's identification 104 (858) and ask you to state what those are?

A. Those are confirmation of sales mailed to customers from our main office in Salt Lake.

Q. And what do those confirmations represent?

A. They show sales of 35,000 Lucky Friday Extension.

Q. For whom?

A. For Mr. J. A. Allen.

Q. And what date?

A. On November 29.

Q. Of what year?

A. 1945.

Q. Now, Mr. Greene, I will hand you Plaintiff's identification 105, and ask you to state what that is?

A. That's a check made payable to Mr. Allen for \$6,872.95 signed by me, and mailed to Mr. Allen from our Butte office.

Q. And bearing what date?

A. Bearing date of December 3, 1945.

Q. Does identification 105 have any relation to identification 104, and if so, what?

A. It covers the sale of 35,000 Lucky Friday Extension on November 29.

THE COURT: How many thousand?

A. Thirty-five thousand.

MR. ERICKSON: I will offer 104 and 105 in evidence (859).

MR. ETTER: A few questions on *voir dire*.

On *voir dire* examination, Mr. Greene testified as follows:

Q. Well, do you remember whether Mr. Allen personally participated in this transaction?

A. Not definitely. I think he delivered the certificates to me personally.

Q. Are you sure that he did?

A. I'm not sure. I think he did, though.

Q. Could this check that you have *you* mailed — isn't it a fact that you mailed that to Mr. Keane's office in Wallace?

A. That I don't remember. I think it should have been mailed to Mr. Allen, unless he gave Mr. Keane's address.

Q. Or you're not sure whether Mr. Keane gave Mr. Keane's address to you and sold the stock in Mr. Allen's name?

A. No, he didn't do that.

Q. But you sent this check someplace, you think to Mr. Allen?

A. Yes, sir.

MR. ETTER: That's all.

(Tr. pp. 815-818, incl.).

The appellant, in view of this testimony, was confronted with positive testimony that he had negotiated a sale, had received, endorsed and cashed a check and as a result had probably received the amount of money indicated by the check of \$6,872.95 (Plaintiff's Exhibit 105). However, there was ample testimony and proof of Keane's forging Allen's name to the Hogle check, being Plaintiff's Exhibit 105, and to a \$60,000 production note of Montana Leasing to Independence, being defendant's exhibit M (Tr. pp. 889, 894). It developed further without contradiction from Keane or otherwise that Allen had never negotiated a sale with Hogle and had not received a check signed by the company, or received the funds after cashing it (Tr. pp. 1066, 1077, 1078, 1091-1093, incl.). Had it not been for discussions which Mr. Allen had with Mr. Denny, as indicated in the record heretofore, he would have been unprepared for the explanation of his forged signature on the documents which were involved in this litigation, and which the prosecution, at least in the case of Plaintiff's Exhibit 105, believed to be genuine and of prime importance in the case against appellant Allen.

The foregoing is submitted to your Honors as illustrative of the same difficulty that appellant had in attempting to meet other allegations and circumstances which were made and which appellant was bound to

inquire into throughout the trial, in respect to validity and authenticity. We think it reasonable to suggest that in view of the skill exhibited by Mr. Keane in handwriting and otherwise, that a logical tendency of the testimony, so far as he and his cohorts were concerned, was toward the false and unlikely rather than the likely and the truth. This argument is not idly made, but is submitted in all sincerity and after a full consideration and clear recollection of the difficulty in attempting to get the truth from Mr. Keane during cross-examination.

The Court likewise in its opinion makes reference to claimed diversions into the War Eagle Silver Lead Mines, Inc. The Court indicated that this company was owned by defendants Keane and Allen and one Ben Porter. However, the evidence so far as Porter's testimony was concerned, did not in anywise support the conclusion. Porter testified that Keane had been his attorney and he further testified that Allen had nothing to do with his securing a loan and that neither Keane nor Allen had, prior to the trial, or at the time of trial, any interest whatsoever in the War Eagle property. (See Appellant's Reply Brief, p. 89.)

Furthermore, the matter of certain checks cashed by Allen is not sufficient warrant, in our opinion, to indicate criminal intent or secrecy. We have pointed out, and as the record speaks, Allen's contributions from personal funds left him the loser by \$80,000. The



transactions referred to are not profits which accrued to Allen under any view of the evidence (Tr. pp. 1115, 1118, 1129, 1130, et. seq.).

The theory of the prosecution which was carried through this entire trial, and the theory upon which conspiratorial interest is sought to be imputed to Allen, arises from the primary thesis that Montana Leasing was in need of funds; that because of this need for funds the conspiracy found origin with the defendants. The proof of the Government was directed to that end throughout the case. This Court concludes that a sufficient basis existed in the facts and circumstances to justify appellant Allen's conviction. The primary premise, however, was not proved and we submit that the basis of the theory falls with the destruction of that primary premise. We respectfully direct the Court's attention on this important phase of the case to the following sections of the record: Tr. pp. 1066, 1067, 1078.

## CONCLUSION

We do not desire to be repetitious or contentious with the Court in making reference to the record, but we respectfully implore the Court to give added consideration to the record so that the wheat may be separated from the chaff. Particularly do we request the Court to consider again the probability and reasonableness of Allen's contention, as opposed to the testimony and evidence which must necessarily find its base

and strongest support in the testimony of Keane, Grismer and Vermillion. We do not feel that the answer to the verdict is found in the opinion of the Supreme Court to the effect that inconsistency in a verdict is no legal ground for reversal. The pleading in the indictment and the character of the proof was such that the case against appellant Allen fell with his acquittal on the first six counts and there was no factual proof of guilt on Count 7, unless a departure is taken from the construction placed upon the facts by the jury in its acquittal.

Respectfully submitted,

R. MAX ETTER,

WILLIAM E. CULLEN,

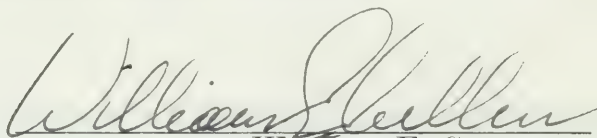
THERRETT TOWLES,

*of Counsel for Appellant.*

## CERTIFICATE

I hereby certify that in my judgment the foregoing  
petition for rehearing is well founded, and that it is  
not interposed for delay.

Respectfully submitted,



---

WILLIAM E. CULLEN.



No. 12438

---

United States  
Court of Appeals  
For the Ninth Circuit.

---

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO,  
Executor of the Last Will and Testament of  
Sanford Plummer, Deceased; CROCKER FIRST NAT'L  
BANK OF S.F., Executor of the Last Will and  
Testament of Caroline Alice Plummer, Deceased,  
as an Individual and distributee; CROCKER FIRST  
NAT'L BANK OF S.F., as Trustee and Distributee  
of the Estate of Sanford Plummer, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

Appeals from the United States District Court,  
Northern District of California,  
Southern Division.

FEB 2 - 1950

PAUL P. O'BRIEN,





No. 12438

---

United States  
Court of Appeals  
For the Ninth Circuit.

---

CAROLINE ALICE PLUMMER and CROCKER  
FIRST NATIONAL BANK OF SAN FRAN-  
CISCO, Executors of the Last Will and Testa-  
ment of Sanford Plummer, Deceased, CARO-  
LINE ALICE PLUMMER, as an Individual  
and Distributee, CROCKER FIRST NA-  
TIONAL BANK OF SAN FRANCISCO, as  
Trustee and Distributee of the Estate of San-  
ford Plummer, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

Appeals from the United States District Court,  
Northern District of California,  
Southern Division.



# INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Agreed Statement of the Case on Appeal.....	2
Findings of Fact.....	3
Certificate of Clerk to Record on Appeal.....	30
Conclusions of Law.....	22
Judgment .....	24
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	26
Order for Judgment.....	20
Statement of Appellants' Points.....	28
Statement of Points and Designation of Record on Appeal.....	32





## NAMES AND ADDRESSES OF ATTORNEYS

J. J. LERMEN, Esq.,  
GEORGE DEVINE, Esq.,

806 Balboa Building,  
San Francisco, California.

Attorneys for Plaintiffs and Appellants.

FRANK J. HENNESSY, Esq.,  
United States Attorney,  
Northern District of California,  
Post Office Building,  
San Francisco, California.

Attorney for Defendant and Appellee.

In the District Court of the United States, In and  
For the Northern District of California, South-  
ern Division

No. 26199-G

CAROLINE ALICE PLUMMER and CROCKER  
FIRST NATIONAL BANK OF SAN FRAN-  
CISCO, Executors of the last Will and Testa-  
ment of SANFORD PLUMMER, deceased,  
CAROLINE ALICE PLUMMER, as an in-  
dividual and distributee, CROCKER FIRST  
NATIONAL BANK OF SAN FRANCISCO,  
as trustee and distributee of the estate of  
Sanford Plummer, deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

AGREED STATEMENT OF THE CASE  
ON APPEAL

It is hereby stipulated by and between the parties  
hereto as follows:

That the questions presented by the appeal of  
Caroline Alice Plummer and Crocker First National  
Bank of San Francisco, Executors of the last Will  
and Testament of Sanford Plummer, deceased, Caro-  
line Alice Plummer, as an individual and distribu-  
tee, Crocker First National Bank of San Francisco,  
as trustee and distributee of the estate of Sanford

Plummer, deceased, can be determined without an examination of all the pleadings, evidence and proceedings in the District Court of the United States, in and for the Northern District of California, Southern Division.

That the following is a true statement of the case showing how the questions arose and were decided in the aforesaid District Court and that the following are so many of the facts averred and proved as are essential to a decision of the questions by the United States Court of Appeals for the Ninth Circuit.

This action was tried upon appropriate pleadings, to-wit, plaintiffs' complaint and defendant's answer thereto.

An "Agreed Statement of Facts" was signed by the parties hereto and filed with the Court, which Agreed Statement of Facts formed the basis for the Court making the following

### "Findings of Fact."

#### I.

"This is an action to recover estate tax and interest, brought against the United States of America under the Revenue Laws of the United States.

#### II.

Sanford Plummer died on the 23rd day of May, 1941, being at that time a citizen of the United States of America and a resident of the County of Alameda, State of California, leaving a last Will

and Testament and estate within the State of California, and elsewhere. In said Will, plaintiffs above named, Caroline Alice Plummer and Crocker First National Bank of San Francisco, were appointed as Executors thereof. Thereafter, and on the 28th day of May, 1941, said Will was filed in the Superior Court of the State of California, in and for the County of Alameda, together with a petition for the probate thereof and the appointment of said plaintiffs as the Executors thereof and of said estate. Thereafter, such proceedings were regularly had and taken in the matter of said proceeding that on the 17th day of June, 1941, the order of said Superior Court was duly and regularly made and filed therein, admitting to probate the said Will of said deceased and appointing the plaintiffs above named, Caroline Alice Plummer and Crocker First National Bank of San Francisco, as Executors of said Will and of said estate, upon their qualifying according to law; that thereafter, and on the 17th day of June, 1941, said plaintiffs qualified accordingly, whereupon Letters Testamentary were issued to said plaintiffs, Caroline Alice Plummer and Crocker First National Bank of San Francisco, as Executors of the last Will and Testament of said Sanford Plummer, deceased, whereupon they became, ever since have been, and still are, the duly appointed, qualified and acting Executors of the last Will and Testament of Sanford Plummer, deceased.

## III.

Plaintiff, Crocker First National Bank of San Francisco, is a National banking association, organized and existing under and by virtue of the laws of the United States, pertaining to National banks, and as such is authorized and empowered to act as an Executor of Wills and to conduct a trust business.

Plaintiff, Caroline Alice Plummer, is and has been, for many years last past, a citizen of the United States of America, and a resident of the County of Alameda, State of California.

Said plaintiff, Crocker First National Bank of San Francisco, has an office in the City and County of San Francisco, State of California, within the first internal revenue collection district of the State of California, and within the jurisdiction of the District Court of the United States for the Northern District of California, Southern Division thereof.

## IV.

“Thereafter, such proceedings were regularly had and taken in said Superior Court, in the administration of the estate of said deceased, that on the 11th day of August, 1942, a decree of distribution of the estate of said deceased was duly and regularly made and filed and entered in the records of said proceeding, distributing said estate to the persons entitled thereto, as set forth in the said decree of distribution. Said decree provided, among other things, as follows:



‘It Is Further Ordered, Adjudged And Decreed that distribution of said estate in the manner, to the extent, and to the persons hereinafter respectively set forth, and in accordance with the provisions of said Will of said deceased, and in accordance with the plan of distribution hereinabove referred to, be and the same is hereby ordered as follows: (A) To Caroline Alice Plummer, all that real and personal property more particularly described as follows, to-wit:’

(Thereafter follows the description of various real and personal properties.) Included therein is the following:

‘(7) An undivided three-quarters interest in and to any other property not now known or discovered, which may belong to said estate, or in which said estate may have an interest, and any property distribution of which has not been included or referred to herein or in the inventory on file herein, which may belong to said estate, or in which said estate may have an interest.’

(B) To Crocker First National Bank of San Francisco, the property thereafter described, in trust for the purposes thereafter set forth. Included therein is the following:

‘(4) An undivided one-quarter interest in and to any other property not now known or discovered which may belong to said estate, or in which said estate may have an interest, and any property distribution of which has not been included or referred to herein or in the inventory on file herein, which

may belong to said estate, or in which said estate may have an interest.'

Said distributee, Caroline Alice Plummer, is one of the plaintiffs hereinabove named.

Said Crocker First National Bank of San Francisco, named as such trustee, is one of the plaintiffs above named.

## V.

The claim of plaintiffs, Caroline Alice Plummer and Crocker First National Bank of San Francisco, as Trustee, is the property of said plaintiffs, as distributees, under the said decree of distribution in the said estate of Sanford Plummer, deceased, and said plaintiffs' rights have not been assigned by them to any person, firm or corporation.

## VI.

Said Sanford Plummer, deceased, and said Caroline Alice Plummer married in the State of California on the 1st day of March, 1904, and thereafter continued to live together as husband and wife, and as residents of the State of California, at all times from the time of their marriage above stated until the death of said Sanford Plummer on the 23rd day of May, 1941.

## VII.

Said Sanford Plummer did, on the 17th day of September, 1939, declare, in writing, in his last Will, copy of which is attached to the complaint in the above entitled action, marked "Exhibit 1," that all of the property owned or possessed by him was

the community property of himself and his wife, Caroline Alice Plummer. Said declaration in said Will is in the following language:

‘Second. I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer.’

### VIII.

As hereinabove stated, paragraph IV hereof, the decree of final distribution of the estate of said deceased was duly and regularly made and filed on the 11th day of August, 1942, in the said probate proceedings, pending in the said Superior Court. Said decree of said Court contains, in part, the following provision thereof:

‘The Court finds that in Paragraph Second of said Will, the said testator declared that all of the property owned or possessed by him had been acquired since his marriage to his wife, Caroline Alice Plummer, and that the whole thereof was the community property of himself and his said wife, Caroline Alice Plummer, which said declaration of said deceased is confirmed by this Court.

The Court finds that the said testator, under the provisions of paragraph Third of his said Will, confirmed the right of his surviving wife, Caroline Alice Plummer, upon his death to receive one-half of all the community property and by way of confirming the same, said testator gave, devised and

bequeathed to his said wife, Caroline Alice Plummer, the said one-half portion of the said community property.

The Court further finds that the Honorable A. T. Shine, the duly appointed, qualified and acting Inheritance Tax Appraiser of this estate, has filed a report in this estate, which report is now on file herein, wherein it is found by the said Inheritance Tax Appraiser that all of the estate of said deceased was and is the community property of said deceased and his said surviving wife, Caroline Alice Plummer. This Court confirms the said report of the said Inheritance Tax Appraiser that all of the estate of said deceased was and is the community property of said deceased and his said surviving wife, Caroline Alice Plummer.

The Court therefore further finds that the said Caroline Alice Plummer is entitled to receive and to have distributed to her one-half of the estate of said deceased, without any deduction therefrom by reason of the payment or discharge of any of the legacies or devises created by the provisions of Paragraphs Fourth and Fifth and the various subparagraphs of Paragraphs Fifth of said Will.'

### IX.

On or about the 18th day of June, 1942, plaintiffs, as such Executors, filed with the Collector of Internal Revenue for the First Collection District of California, a Federal estate tax return, Form 706, for the said estate of Sanford Plummer, deceased. Plaintiffs returned in said estate tax return one-half

only of the property owned by said decedent and said Caroline Alice Plummer at the time of the death of said Sanford Plummer, standing in the names of them, or either of them, at the time of the death of said Sanford Plummer. Said Federal estate tax return showed a total estate tax payable of \$12,727.46; that said Federal estate tax, so shown to be due, was duly paid by plaintiffs, as such Executors of said estate, to the Collector of Internal Revenue for the First Collection District of California, at San Francisco, California, on the 18th day of June, 1942.

#### X.

Thereafter, the Commissioner of Internal Revenue for the United States of America, through his duly constituted agent, audited said Federal estate tax return, Form 706, filed by plaintiffs on behalf of the estate of said Sanford Plummer, deceased, and in connection with said audit, said Commissioner of Internal Revenue ruled against the claim of plaintiffs that all of the property owned by decedent and said Caroline Alice Plummer, his wife, at the date of decedent's death, was the community property of both of them, and that under the laws of the State of California each had a present, existing and equal interest therein, and said Commissioner of Internal Revenue included in decedent's gross estate, for the purpose of determining the Federal estate tax, nine-tenths thereof, instead of one-half thereof.



## XI.

The Commissioner of Internal Revenue determined a deficiency in federal estate tax of the Estate of Sanford Plummer, deceased, in the sum of \$21,874.78 and a total estate tax liability of \$34,602.24, which plaintiffs, as such Executors, did pay, at San Francisco, California, to Honorable Harold L. Berliner, Collector of Internal Revenue of the United States for the First District of California, then in office, the amount of said alleged deficiency tax, to-wit, \$21,874.78 and interest thereon from the 23rd day of August, 1942, to the 12th day of January, 1943, at the rate of 6% thereof, or the sum of \$510.40, a total payment on said 12th day of January, 1943, of \$22,385.18.

## XII.

Prior to the commencement of this action, the said Harold L. Berliner, to whom the above payments were made, resigned as Collector of Internal Revenue for the First District of California, and said Harold L. Berliner no longer holds the office of Collector of Internal Revenue for the First District of California.

## XIII.

On or about the 31st day of March, 1944, plaintiffs, as Executors of the Last Will and Testament of Sanford Plummer, deceased, filed with the said Honorable Harold L. Berliner, Collector of Internal Revenue for the First District of California, at San Francisco, California, a claim for refund of said tax and interest, collected by defendant; that said claim for refund was filed within the time pro-

vided therefor and in accordance with the provisions of law pertaining thereto and the regulations established in pursuant thereof.

#### XIV.

Thereafter, and under date of August 31, 1944, plaintiffs, as such Executors, received from the Commissioner of Internal Revenue of the Treasury Department of the United States, at Washington, D.C., a letter, notifying plaintiffs that the claim filed by them on April 3, 1944, hereinabove referred to, for the refund of \$21,874.78, together with the said additional sum paid as interest thereon, viz. the added sum of \$510.40, together with interest upon the whole thereof, was rejected in its entirety.

No part of said sum of \$21,874.78 and \$510.40, or the aggregate amount thereof, viz, the sum of \$22,385.18, or interest thereon, has been refunded or repaid to plaintiffs, or either of them, or any person on their behalf; that there are no off-sets of any kind or nature against said claim."

In addition to the "Agreed Statement of Facts," hereinbefore referred to, certain documentary evidence was introduced at the trial of said action, which documentary evidence was to this effect:

1. That Sanford Plummer filed individual Federal income tax returns for the calendar years 1939-1940 and for prior years, wherein he reported only 20% of the income received by him on investments in stocks and bonds as community income divisible with his wife.

Said income tax returns for the calendar years 1939 and 1940 contained the following statements:

“This taxpayer contends that substantially all of his income from dividends constitutes community income in which his wife has a one-half interest. On the basis of revenue agents’ reports, covering examinations of taxpayer’s income tax return and those of his wife for the years 1935 to 1937, only 20% of income on the above securities is reported as community income.”

“This taxpayer contends that substantially all of his interest income constitutes community income in which his wife has a vested one-half interest. In order to avoid a controversy on the basis of revenue agents’ reports covering examinations of this taxpayer’s income tax returns for the years 1935 to 1937, only 20% of the income on the above securities was reported as community income in this return.”

2. It was stipulated at the trial of said action that Scott Dunham, the accountant who prepared the income tax returns of said Sanford Plummer, if called as a witness in said action, would testify as to all matters of fact contained in the following affidavit:

“State of California

City and County of San Francisco

Scott Dunham, being first duly sworn, deposes and says:

I am now, and for some years last past, have been associated with John F. Forbes & Company, certi-

fied public accountants, with offices in the City of San Francisco, and elsewhere throughout the United States.

I personally knew Sanford Plummer, a resident of the County of Alameda, State of California, who died on May 23, 1941.

The said Sanford Plummer engaged the services of the said John F. Forbes & Company to prepare his Federal and California individual income tax returns and those of his wife, Caroline A. Plummer, for the calendar years 1939 and 1940.

Affiant personally gave his attention to the preparation of said returns. In connection therewith, affiant made inquiry of the said Sanford Plummer relating to the community status of property and income of himself and wife. Said Sanford Plummer advised affiant that substantially all of his property constituted community property and he desired to know the distinction between community property acquired prior to July 29, 1927, and community property acquired subsequent to that date.

Affiant advised Sanford Plummer that community property acquired prior to July 29, 1927, was treated, for Federal and State income tax purposes, as property in which the wife had only an expectancy and that income derived on such property, for Federal and State income tax purposes, was treated as though it constituted the income of the husband. Affiant also advised said Sanford Plummer that community property acquired subsequent to July 29, 1927, ex-

clusive of income derived after that date on community property acquired prior to that date, constituted community property in which husband and wife had equal interests under the provisions of Section 161(a) of the Civil Code. Affiant outlined the policy followed by the Treasury Department and the California Franchise Tax Commissioner in determining what constituted community property and income acquired subsequent to July 29, 1927.

Said Sanford Plummer advised affiant that according to the best of his information, a substantial part of his estate consisted of community property acquired subsequent to July 29, 1927. He advised that his former tax adviser had carefully considered this matter and that the Treasury Department had conceded that 20% of his income from dividends and interest constituted community property in which he and his wife had equal one-half interests and that the remainder of the income constituted community income taxable to Sanford Plummer. Said Sanford Plummer advised affiant that, in his opinion, more than 20% of his estate constituted community property in which he and his wife had vested interests. He advised, however, that he did not desire to have further tax controversies or arguments with either the Treasury Department or the State Franchise Tax Commissioner relating to his personal income tax liabilities and those of Mrs. Plummer. According to his instructions, affiant was to treat 20% of the income derived from dividends and interest as community income divisible equally between said Sanford Plummer, and Caroline A. Plummer, his



wife. The remainder of the income from these securities was to be treated as community income taxable to said Sanford Plummer. Affiant followed this procedure in preparing the Federal and State income tax returns of Sanford Plummer and of Caroline A. Plummer for the years 1939 and 1940. Pursuant to affiant's conference with Sanford Plummer, affiant did not make an independent investigation in order to determine the community status of property and income owned by said Sanford Plummer.

There is a note in the files of John F. Forbes & Company to the effect that Revenue Agents' Reports for the years 1935 to 1937 classified 20% of the income received on stocks and bonds as income divisible equally between said Sanford Plummer and Caroline A. Plummer. In light of this fact and of information submitted to affiant by said Sanford Plummer, affiant followed the procedure of classifying 20% of income received on investments in stocks and bonds as divisible community income in filing the income tax returns of Sanford Plummer and Caroline A. Plummer for the years 1939 and 1940.

SCOTT DUNHAM.

Subscribed and sworn to before me this 23rd day of June, 1943.

W. W. HEALEY,

Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires March 3, 1946.

3. The letter from the Commissioner of Internal Revenue, rejecting plaintiffs' claim for refund, reads as follows:

Treasury Department  
Washington 25

Office of Commissioner of Internal Revenue  
MT-ET-11271-1st California

Estate of Sanford Plummer

Date of death—May 23, 1941

Crocker First National Bank

of San Francisco, et al., Executors,  
1 Montgomery Street  
San Francisco, California

Aug. 31, 1944.

Gentlemen:

Reference is made to the claim on Form 843 filed April 3, 1944, for the refund of \$21,874.78, Federal estate tax paid on behalf of the above-named estate. It is contended that all property of the decedent acquired before or after July 29, 1927, (the effective date of section 161 of the Civil Code of California) should be treated for estate tax purposes as community property and only one-half thereof should be included for tax.

It appears that subsequent to July 29, 1927, decedent returned for Federal income tax 80 per cent of all income from investments as separate property. The remaining 20 per cent was treated as com-

munity property. This division of separate and community property was followed for Federal estate tax and the tax liability determined on that basis.

This question has been considered many times by the United States Board of Tax Appeals (now The Tax Court of the United States) and the courts and it has been repeatedly held that the interest of the surviving wife in community property acquired prior to July 29, 1927, is includible in the gross estate of the deceased husband for Federal estate tax. *United States v. Robbins*, 269 U. S. 315. Also see *Gump v. Commissioner*, 42 B.T.A. 197; affirmed 124 Fed. (2d) 540, certiorari denied 62 S. Ct. 1292 and authorities cited therein. The statement in the decedent's will to the effect that all property was acquired since marriage and the whole thereof is community property is not equivalent to an agreement made during decedent's lifetime transferring separate property into community property in which the wife had a vested interest.

In view of the foregoing, the claim filed April 3, 1944, for the refund of \$21,874.78 is rejected in its entirety.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner.

By /s/ ADELBERT CHRISTY,

Acting Deputy Commissioner.

Based upon the foregoing documentary evidence, the Court made the following further Findings of Fact:

## “XV.

Sanford Plummer filed individual federal income tax returns for the calendar years 1939-1940, and for prior years wherein he reported only 20% of the income received by him on investments in stocks and bonds as community income divisible with his wife.

## XVI.

Not more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of community property acquired by himself and his wife subsequent to July 29, 1927, in which she had a present or ‘vested’ interest at the time of his death.”

The foregoing Findings of Fact, numbered I to XVI, inclusive, constitute all of the Findings of Fact in said action.

After submission of the cause, and on July 25, 1949, and before the making of the aforesaid Findings of Fact, the Honorable Louis B. Goodman, Judge of said Court, caused to be filed herein his Order for Judgment, which reads as follows:

Original Filed July 25, 1949, Clerk, U. S. Dist. Court, San Francisco.

In the United States District Court for the North-  
ern District of California, Southern Division  
No. 26199-G

CAROLINE ALICE PLUMMER, et al.,  
Plaintiff,  
vs.  
UNITED STATES OF AMERICA,  
Defendant.

### ORDER FOR JUDGMENT

In this action, plaintiffs seek refund of estate taxes paid in the sum of \$21,874.78 upon the ground that the Commissioner erroneously included in decedent Sanford Plummer's statutory gross estate, the entire value of all property standing in his name at death (May 23, 1941). The Commissioner's alleged error, urged in a claim for refund, which was administratively denied, and reasserted here, is that such property was community property since September 17, 1939 (date of decedent's last will), in which decedent's wife had a present, vested and equal interest. The basis of the claim, that the wife had such half interest, is that in his last will, the decedent declared his property to be of the community.

There is no doubt and both sides so concede, that under California statutes and federal decisions, since July 29, 1927<sup>1</sup> in California, the wife has a 'present,

---

<sup>1</sup>Calif. Civil Code, Sec. 161a; *United States v. Malcolm* 282 U. S. 792; *Sherman v. Commissioner*, 9 Cir. 76 F. 2d 810; *Shea v. Commissioner*, 9 Cir. 81 F. 2d 937.



existing and equal interest' in community property, and that by agreement the husband and wife can fix or transmute their property from separate to community or vice versa.<sup>2</sup>

The sole question here posed is whether the declaration in the decedent's will<sup>3</sup> is equivalent to such an agreement.

Neither good reason or cited precedent sustain plaintiff's contention. The declaration in decedent's will was unilateral. The will itself was ambulatory.<sup>4</sup> It spoke only as of the date of death and could have been revoked or modified at any time. None of the fundamentals of contract inhered in it.

The cases cited by plaintiff are not apposite.<sup>5</sup>

---

<sup>2</sup>Calif. Civil Code, Sects. 158, 159, 160; *Re Freitas*, 16 F. Supp. 557; *Sampson v. Welch*, 23 F. Supp. 271; *Kenney v. Kenney*, 220 Cal. 134, 30 P. 2d 398; *Siberell v. Siberell*, 214 Cal. 767, 7 P. 2d 1003.

---

<sup>3</sup>The declaration is as follows:

"Second: I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer."

---

<sup>4</sup>68 C. J. 602; *Nichols v. Emery*, 109 Cal. 323, 329, 41 Pac. 1089; *Niccols v. Niccols*, 168 Cal. 444, 143 Pac. 712.

---

<sup>5</sup>In *Bank of America v. Rogan*, 33 F. Supp. 183, there was an agreement signed by both husband and wife; In *Estate of Watkins*, 16 Cal. 2d 793, there were joint and mutual wills, held to constitute a contract; *Herman v. Mortensen*, 72 Cal. App. 2d 413, concerned an inter vivos gift.

Judgment for defendant. Prepare findings pursuant to the Rules.

Dated: July 25, 1949.

LOUIS E. GOODMAN,  
U. S. District Judge.”

---

The aforesaid Findings of Fact were lodged herein, together with certain conclusions of law, reading as follows:

### “CONCLUSIONS OF LAW

#### I.

“The provisions of the will of Sanford Plummer, deceased, did not amount to an agreement between himself and Caroline Alice Plummer, converting either his separate property or their community property acquired prior to July 29, 1927, into the type of California community property in which the wife held a present or ‘vested’ interest within the meaning of Section 161(a) of the California Civil Code.

#### II.

That no more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of California community property of the type defined by Section 161(a) of the California Civil Code.

#### III.

That the Commissioner of Internal Revenue correctly determined the gross estate of Sanford Plummer, deceased, for Federal Estate Tax purposes.

IV.

That the estate of Sanford Plummer, deceased, did not overpay its Federal Estate Tax.

V.

That plaintiffs are entitled to no recovery in this action.

VI.

That the defendant is entitled to a judgment of dismissal and for its costs to be taxed by the clerk of this Court against the plaintiffs in this action.”

Judgment was entered on August 4, 1949, in favor of defendant. Said judgment reads as follows:

“In the United States District Court for the Northern District of California, Southern Division

No. 26199-G

CAROLINE ALICE PLUMMER and CROCKER  
FIRST NATIONAL BANK OF SAN FRANCISCO,  
Executors of the Last Will and Testament of  
SANFORD PLUMMER, Deceased, and  
CAROLINE ALICE PLUMMER, as an Individual  
and Distributee, CROCKER FIRST NATIONAL  
BANK OF SAN FRANCISCO, as Trustee and  
Distributee of the Estate of SANFORD  
PLUMMER, Deceased,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA,  
Defendant.

### JUDGMENT

The above-entitled action was submitted to the Court for decision upon the pleadings, and ‘Agreed Statement of Facts’ and the briefs of the parties and the Court after consideration of the same made its Findings of Fact and Conclusions of Law;

Now, therefore, It Is Ordered, Adjudged and Decreed that plaintiffs take nothing by this action but that the defendant do, and it hereby does, have judgment against plaintiffs for dismissal of this

action and defendants' costs taxed in the sum of  
\$. . . . .

Dated this 3rd day of August, 1949.

LOUIS E. GOODMAN,  
U. S. District Judge.

Approved as to form as provided by Rule 5(d) of  
this Court.

. . . . .,  
. . . . .,  
Attorneys for Plaintiffs."

Plaintiffs thereupon duly and timely noticed a motion for a new trial, to open the judgment, amend the findings of fact and conclusions of law, and for the entry of a new judgment.

Said motions were heard by the aforesaid Judge Goodman on the 21st day of September, 1949, and argued orally by counsel for plaintiff and defendant, respectively, and submitted for the decision of said Court, and on the 22nd day of September, 1949, said motions were, and each of them was, severally denied by the Judge of said Court, the Honorable Louis E. Goodman.

Thereafter, and on the 30th day of September, 1949, said plaintiffs duly filed their notice of appeal from said judgment. A copy of said notice of appeal, with its filing date, is as follows:



“In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 26199-G

CAROLINE ALICE PLUMMER and CROCKER  
FIRST NATIONAL BANK OF SAN FRANCISCO, Executors of the Last Will and Testament of SANFORD PLUMMER, Deceased,  
CAROLINE ALICE PLUMMER, as an Individual and Distributee, CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as Trustee and Distributee of the Estate of SANFORD PLUMMER, Deceased,  
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,  
Defendant and Appellee.

### NOTICE OF APPEAL

Notice Is Hereby Given that Caroline Alice Plummer and Crocker First National Bank of San Francisco, Executors of the last Will and Testament of Sanford Plummer, deceased, Caroline Alice Plummer, as an individual and distributee, and Crocker First National Bank of San Francisco, as trustee and distributee of the estate of Sanford Plummer, deceased, plaintiffs above named, hereby appeal to the United States Court of Appeals for

the Ninth Circuit from the final judgment entered in this action on August 4, 1949.

J. J. LERMEN,  
GEORGE DEVINE,

Attorneys for Appellants, Caroline Alice Plummer and Crocker First National Bank of San Francisco, Executors of the Last Will and Testament of Sanford Plummer, Deceased, Caroline Alice Plummer, as an Individual and Distributee, and Crocker First National Bank of San Francisco, as Trustee and Distributee of the Estate of Sanford Plummer, Deceased. Address: Balboa Building, San Francisco, California."

Filed Sept. 30, 1948, Clerk, U. S. Dist. Court, San Francisco.

On said 30th day of September, 1949, said plaintiffs duly filed herein their bond on appeal in the sum of \$250.00.

The foregoing may be used as a statement of facts as the record on appeal.

/s/ J. J. LERMEN,

/s/ GEORGE DEVINE,

Attorneys for Plaintiffs and  
Appellants..

/s/ FRANK J. HENNESSY,

/s/ C. EMMETT COLLETT,

Attorneys for Defendant and  
Appellee.

## STATEMENT OF APPELLANTS' POINTS

A concise statement of the points to be relied upon by appellants is as follows:

1) The case is to be governed by the law of California.

2) In California, since July 29, 1927, the wife has a "present, existing and equal interest" in community property.

3) In California, husband and wife may fix the character of their property by agreement, oral or in writing.

4) The statement by the deceased, Sanford Plummer, in his Will that all of his property was the community property of himself and his wife, Caroline Alice Plummer, was and is the equivalent of an agreement to that effect between said Sanford Plummer and his said wife, Caroline Alice Plummer.

5) Said statement of deceased was confirmed by the decree of the Superior Court of the State of California, in and for the County of Alameda, determining that all of the property of the estate of said decedent was community property of himself and his said wife, and finally distributing the estate of said decedent to the parties entitled thereto.

6) Said statement, being entirely for the benefit of said Caroline Alice Plummer, and for her benefit alone, is presumed by law to have been ac-

cepted by her, and said presumption, not being controverted by other evidence, either direct or indirect, is evidence of the fact of such acceptance.

7) Said statement by Sanford Plummer in his Will that all of his property was community property had the effect of vesting in plaintiff, Caroline Alice Plummer, a present, existing and equal interest in all of his estate.

8) Only one-half of the estate of the deceased, Sanford Plummer, should be included in the gross estate of said deceased, subject to the imposition and payment of any Federal estate tax in effect on the date of the death of said deceased, namely, May 23rd, 1941.

9) Plaintiffs and appellants are therefore entitled to a judgment in their favor for the refund prayed for in their complaint.

/s/ J. J. LERMEN,

/s/ GEORGE DEVINE,

Attorneys for Plaintiffs and  
Appellants.

The foregoing statement of the case on appeal is hereby approved.

Dated this 23rd day of December, 1949.

/s/ LOUIS E. GOODMAN,

Judge of the U. S. District  
Court.

[Endorsed]: Filed December 23, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD  
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing document, listed below, is the original filed in this Court, in the above-entitled case, and that it constitutes the Record on Appeal herein, to wit:

Agreed Statement of the Case on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of December, A.D. 1949.

[Seal]                      C. W. CALBREATH,  
Clerk.

By /s/ M. E. VAN BUREN,  
Deputy Clerk.



[Endorsed]: No. 12438. United States Court of Appeals for the Ninth Circuit. Caroline Alice Plummer and Crocker First National Bank of San Francisco, Executors of the Last Will and Testament of Sanford Plummer, Deceased, Caroline Alice Plummer, as an Individual and Distributee, Crocker First National Bank of San Francisco, as Trustee and Distributee of the Estate of Sanford Plummer, Deceased, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 27, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Judicial Circuit  
No. 12438

CAROLINE ALICE PLUMMER, et al.,  
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,  
Defendant and Respondent.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD ON APPEAL

Plaintiffs and appellants hereby designate the Agreed Statement of the Case on Appeal, heretofore filed in the above-entitled Court, as the record to be printed on the appeal of the above-entitled cause.

Plaintiffs and appellants hereby adopt as the points to be relied upon by them upon said appeal the statement of appellants' points contained in the aforesaid Agreed Statement of the Case on Appeal.

/s/ J. J. LERMEN,

/s/ GEORGE DEVINE,

Attorneys for Plaintiffs and  
Appellants.

[Endorsed]: Filed Dec. 28, 1949.

IN THE

# United States Court of Appeals For the Ninth Circuit

---

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Sanford Plummer, Deceased; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Caroline Alice Plummer, Deceased, as an individual and distributee; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as trustee and distributee of the Estate of Sanford Plummer, Deceased,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANTS' OPENING BRIEF.

---

J. J. LERMEN,

GEORGE DEVINE,

806 Balboa Building, San Francisco 5, California,

*Attorneys for Appellants.*

FILED

FEB 16 1950

PAUL P. O'BRIEN,

CLERK



## Subject Index

---

	Page
Jurisdictional statement .....	1
Statutes and regulations relied upon.....	4
Statement of the case, questions involved, and the manner in which they are raised .....	5
Specification of errors .....	7
Preamble to argument .....	8
Argument of the case.....	8
(1) Since July 29, 1927, in California the wife has a present, existing and equal interest in community property.....	8
(2) By agreement, the husband and wife can fix or trans- mute their property from separate to community, or vice versa, or from pre-1927 type of community property to post-1927 type of community property.....	9
(3) The legal effect of the statement in decedent's will must be determined by the law of California.....	9
(4) The administration of decedent's estate was and is a proceeding in rem, and binding on the whole world....	10
(5) The declaration of the decedent in his last will, dated September 17, 1939, that all of his estate was the com- munity property of himself and his wife, invested all of his property with the status of community property, in which the wife had a present, existing and equal interest	11
(6) The declaration of the deceased husband loses none of its force merely because it is contained in his will.....	16
Conclusion .....	22



## Table of Authorities Cited

Cases	Pages
Adams v. Lansing, 17 Cal. 629.....	19
Bank of America v. Rogan, 33 F. Supp. 183.....	9, 10, 11, 15
Bergman v. Ornbaun, 33 C. A. (2d) 680.....	13
Edlund v. Superior Ct., 209 Cal. 690.....	10
Estate of Basso, 79 C. A. (2d) 758.....	10
Estate of Belknap, 66 C. A. (2d) 644.....	13
Estate of Jameson, 93 A.C.A. 73.....	13, 21
Estate of Kalt, 16 Cal. (2d) 807.....	16
Estate of Watkins, 16 Cal. (2d) 793.....	14
Estate of Wise, 34 A.C. 441.....	10
Frymire v. Brown, 94 A.C.A. 366.....	20
Herman v. Mortensen, 72 C. A. (2d) 413.....	12, 13
In re May's Estate, 160 N.W. 790.....	17
Kenney v. Kenney, 220 Cal. 134, 30 P. (2d) 398.....	9
Kopp v. Gunther, 95 Cal. 63.....	18
Medel v. Avecillia, 15 Philippine Rep. 465.....	18
Norton v. Estate of Norton, 41 Cal. App. 614.....	19
Opp v. Frye, 70 C. A. (2d) 478.....	20
Re Freitas, 16 F. Supp. 557.....	9
Roman v. Agosto, 27 Porto Rico Reports 529.....	18
Sampson v. Welch, 23 F. Supp. 271.....	9
Security First National Bank v. Stack, 32 C. A. (2d) 586...	20
Shea v. Commissioner, 9 Cir., 81 Fed. (2d) 937.....	8
Sherman v. Commissioner, 9 Cir., 76 Fed. (2d) 810.....	8
Siberell v. Siberell, 214 Cal. 767, 7 P. (2d) 1003.....	9
United States v. Malcolm, 282 U.S. 792.....	8
White v. Holden, 60 S.W. 437 (Tex.).....	19

## Subject Index

---

	Page
Jurisdictional statement .....	1
Statutes and regulations relied upon.....	4
Statement of the case, questions involved, and the manner in which they are raised .....	5
Specification of errors .....	7
Preamble to argument .....	8
Argument of the case.....	8
(1) Since July 29, 1927, in California the wife has a present, existing and equal interest in community property.....	8
(2) By agreement, the husband and wife can fix or trans- mute their property from separate to community, or vice versa, or from pre-1927 type of community property to post-1927 type of community property.....	9
(3) The legal effect of the statement in decedent's will must be determined by the law of California.....	9
(4) The administration of decedent's estate was and is a proceeding in rem, and binding on the whole world....	10
(5) The declaration of the decedent in his last will, dated September 17, 1939, that all of his estate was the com- munity property of himself and his wife, invested all of his property with the status of community property, in which the wife had a present, existing and equal interest	11
(6) The declaration of the deceased husband loses none of its force merely because it is contained in his will.....	16
Conclusion .....	22

## Table of Authorities Cited

Cases	Pages
Adams v. Lansing, 17 Cal. 629.....	19
Bank of America v. Rogan, 33 F. Supp. 183.....	9, 10, 11, 15
Bergman v. Ornbaun, 33 C. A. (2d) 680.....	13
Edlund v. Superior Ct., 209 Cal. 690.....	10
Estate of Basso, 79 C. A. (2d) 758.....	10
Estate of Belknap, 66 C. A. (2d) 644.....	13
Estate of Jameson, 93 A.C.A. 73.....	13, 21
Estate of Kalt, 16 Cal. (2d) 807.....	16
Estate of Watkins, 16 Cal. (2d) 793.....	14
Estate of Wise, 34 A.C. 441.....	10
Frymire v. Brown, 94 A.C.A. 366.....	20
Herman v. Mortensen, 72 C. A. (2d) 413.....	12, 13
In re May's Estate, 160 N.W. 790.....	17
Kenney v. Kenney, 220 Cal. 134, 30 P. (2d) 398.....	9
Kopp v. Gunther, 95 Cal. 63.....	18
Medel v. Avecillia, 15 Philippine Rep. 465.....	18
Norton v. Estate of Norton, 41 Cal. App. 614.....	19
Opp v. Frye, 70 C. A. (2d) 478.....	20
Re Freitas, 16 F. Supp. 557.....	9
Roman v. Agosto, 27 Porto Rico Reports 529.....	18
Sampson v. Welch, 23 F. Supp. 271.....	9
Security First National Bank v. Stack, 32 C. A. (2d) 586...	20
Shea v. Commissioner, 9 Cir., 81 Fed. (2d) 937.....	8
Sherman v. Commissioner, 9 Cir., 76 Fed. (2d) 810.....	8
Siberell v. Siberell, 214 Cal. 767, 7 P. (2d) 1003.....	9
United States v. Malcolm, 282 U.S. 792.....	8
White v. Holden, 60 S.W. 437 (Tex.).....	19

**Statutes**

Civil Code :	Pages
Sections 158, 159, 160 .....	9
Section 161a .....	8, 17
Sections 172, 172a .....	17
Code of Civil Procedure :	
Section 1908 .....	10
Probate Code :	
Section 1021 .....	10
Revenue Act of 1942 .....	4
26 U.S.C.A., p. 224 et seq. ....	5

**Texts**

1 Redfield on Wills, 4th Ed., Section 30, page 386.....	17
Tiffany on Real Property, Section 1055, page 253.....	16





IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Sanford Plummer, Deceased; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Caroline Alice Plummer, Deceased, as an individual and distributee; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as trustee and distributee of the Estate of Sanford Plummer, Deceased,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLANTS' OPENING BRIEF.**

---

**JURISDICTIONAL STATEMENT.**

Appellants seek the redetermination of a deficiency in Federal estate tax, as determined by the Appellee.

The decedent, Sanford Plummer, a resident of the County of Alameda, State of California, died on the 23rd day of May, 1941.

Crocker First National Bank of San Francisco, a corporation, was and is the duly appointed, qualified and acting Executor of the last will of said Sanford Plummer, deceased, and was co-Executor of said will with Caroline Alice Plummer until her death on the 9th day of December, 1949. Thereafter, and on the 4th day of January, 1950, said Crocker First National Bank of San Francisco became, and now is, the duly appointed, qualified and acting Executor of the last Will of said Caroline Alice Plummer, deceased, and is also a trustee and distributee of the estate of Sanford Plummer, deceased.

Heretofore, and on the 30th day of January, 1950, said Crocker First National Bank of San Francisco reported to this Court the death of said Caroline Alice Plummer, whereupon this Court made an order that this action continue in the names of "Crocker First National Bank of San Francisco, Executor of the Last Will and Testament of Sanford Plummer, deceased; Crocker First National Bank of San Francisco, Executor of the Last Will and Testament of Caroline Alice Plummer, deceased, as an individual and distributee; Crocker First National Bank of San Francisco, as trustee and distributee of the estate of Sanford Plummer, deceased, plaintiffs and appellants, vs. United States of America, defendant and appellee."

A Federal estate tax return for the estate of Sanford Plummer, deceased, was duly filed with the Collector of Internal Revenue for the First Collection District of California, and the tax reported thereon, in the amount of \$12,727.46, was paid on the 18th day of June, 1942. (Tr. 9-10.) On the 16th day of December, 1942, Appellee sent a notice of deficiency in respect to estate tax in the sum of \$21,874.78 and interest thereon from the 23rd day of August, 1942, to the 12th day of January, 1943, at the rate of 6% thereof, or the sum of \$510.40, which said deficiency was paid on the 12th day of January, 1943, making the total estate tax liability paid by Appellants the sum of \$34,602.24. (Tr. 11.)

On March 31, 1944, a claim for a refund of said deficiency tax and interest was duly filed with the Collector of Internal Revenue for said First District of California. (Tr. 11.)

Thereafter, and under date of August 31, 1944, Appellants received from the Commissioner of Internal Revenue of the Treasury Department of the United States, a letter, notifying Appellants that their claim for the said refund of the deficiency tax and interest thereon was rejected in its entirety. (Tr. 12.)

Thereafter, and on the 18th day of July, 1946, this action was commenced in the District Court of the United States, in and for the Northern District of California, Southern Division, for the recovery of the amount of the said deficiency tax and for the interest thereon from the time of said payment.

The pleadings necessary to show the existence of jurisdiction are the complaint in said action and the answer thereto.

The said cause was submitted to the District Court for its decision upon the pleadings and an agreed Statement of Facts (Tr. 3-12), and upon the briefs of the parties, whereupon the said District Court made its Findings of Fact (Tr. 3-12 and 19) and Conclusions of Law (Tr. 22, 23) and ordered that the defendant, the Appellee herein, have judgment against the plaintiffs, the Appellants herein, for a dismissal of said action and for defendant's costs. (Tr. 24, 25.)

Thereafter, Appellants made a motion for a new trial, to open the Judgment, amend the Findings of Fact and Conclusions of Law and for the entry of a new Judgment. (Tr. 25.)

Said motions were heard by the Honorable Louis E. Goodman, Judge of said District Court, and on the 22nd day of September, 1949, said motions were severally denied. (Tr. 25.)

On the 30th day of September, 1949, Appellants duly filed their notice of appeal from said Judgment. (Tr. 25, 27.)

---

#### **STATUTES AND REGULATIONS RELIED UPON.**

This case arose under the provisions of the Internal Revenue Code, prior to the effective date of the Revenue Act of 1942.

The law in force as of the time of the death of Sanford Plummer, May 23, 1941, is set forth in Revenue Act of 1926, secs. 300-303:

“Sec. 302. The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death.”

(26 *U.S.C.A.* p. 224 et seq.)

---

#### **STATEMENT OF THE CASE, QUESTIONS INVOLVED, AND THE MANNER IN WHICH THEY ARE RAISED.**

This case involves the correctness of the ruling of the Commissioner of Internal Revenue and of the decision and the Judgment of the District Court approving the same and fixing the deficiency with respect to the Federal estate tax liability of the estate of the said Sanford Plummer, deceased.

All of the facts, in any way, directly or indirectly, relating to the sole question of law involved, have been agreed upon and are incorporated in the Agreed Statement of the Case on Appeal, filed in the District Court on December 23, 1949, approved by the attorneys for the Appellants and the Appellee and approved by the Honorable Louis E. Goodman, Judge of the United States District Court on December 23, 1949. (Tr. 2-27.)



In his Order for Judgment (Tr. 20-22), the learned Judge for the District Court has fairly stated, in a few words, that the only issue in this case is the legal effect of a statement made by the deceased, Sanford Plummer, in his last Will, dated September 17, 1939, as follows:

“*SECOND*: I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer.” (Tr. 8.)

The Judge of the District Court held:

“In this action, plaintiffs seek refund of estate taxes paid in the sum of \$21,874.78 upon the ground that the Commissioner erroneously included in decedent Sanford Plummer’s statutory gross estate, the entire value of all property standing in his name at death. (May 23, 1941.) The Commissioner’s alleged error, urged in a claim for refund, which was administratively denied, and reasserted here, is that such property was community property since September 17, 1939 (date of decedent’s last will) in which decedent’s wife had a present, vested and equal interest. The basis of the claim, that the wife had such half interest, is that in his last will, the decedent declared his property to be of the community.”

“There is no doubt and both sides so concede, that under California statutes and federal decisions, since July 29th, 1927 in California, the wife has a ‘present, existing and equal interest’ in community property, and that by agreement

the husband and wife can fix or transmute their property from separate to community or vice versa."

"The sole question here posed is whether the declaration in the decedent's will is equivalent to such an agreement." (Tr. 20, 21.)

With that last statement of the sole question in this case, we wholly agree.

But, from the conclusions drawn from the above by the learned Judge of the District Court, we wholly disagree.

---

#### **SPECIFICATION OF ERRORS.**

The trial Court erred in making the following Finding of Fact:

#### **"XVI.**

Not more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of community property acquired by himself and his wife subsequent to July 29, 1927, in which she had a present or 'vested' interest at the time of his death." (Tr. 19.)

The trial Court erred in making each and all of its Conclusions of Law, I to VI, inclusive. (Tr. 22-23.)

The aforesaid Findings of Fact and Conclusions of Law are alleged to be erroneous by Appellants for the following reason, succinctly stated:

The statement by the deceased, Sanford Plummer, in his Will, that all of his property was community

property of himself and his wife, had the effect of investing the property with the status of community property, of post-1927 type, in which the wife had a vested one-half interest.

The errors in said Findings of Fact and Conclusions of Law will more fully appear in the Argument of the Case, hereinafter.

---

### **PREAMBLE TO ARGUMENT.**

While it may seem a work of supererogation to cite authorities supporting principles of law agreed to by all of the parties hereto, nevertheless we shall set forth, hereinafter, supporting authorities of such laws as we deem necessary parts of the entire structure of Appellants' case.

---

### **ARGUMENT OF THE CASE.**

(1) SINCE JULY 29, 1927, IN CALIFORNIA THE WIFE HAS A PRESENT, EXISTING AND EQUAL INTEREST IN COMMUNITY PROPERTY.

*Calif. Civil Code*, Sec. 161a;

*United States v. Malcolm*, 282 U.S. 792;

*Sherman v. Commissioner*, 9 Cir. 76 Fed. (2d) 810;

*Shea v. Commissioner*, 9 Cir. 81 Fed. (2d) 937.

- (2) BY AGREEMENT, THE HUSBAND AND WIFE CAN FIX OR TRANSMUTE THEIR PROPERTY FROM SEPARATE TO COMMUNITY, OR VICE VERSA, OR FROM PRE-1927 TYPE OF COMMUNITY PROPERTY TO POST-1927 TYPE OF COMMUNITY PROPERTY.

*Calif. Civil Code*, Sects. 158, 159, 160;

*Re Freitas*, 16 F. Supp. 557;

*Sampson v. Welch*, 23 F. Supp. 271;

*Kenney v. Kenney*, 220 Cal. 134, 30 P. (2d) 398;

*Siberell v. Siberell*, 214 Cal. 767, 7 P. (2d) 1003.

---

- (3) THE LEGAL EFFECT OF THE STATEMENT IN DECEDENT'S WILL MUST BE DETERMINED BY THE LAW OF CALIFORNIA.

“The rights of the wife are to be determined by the law of California. *Talcott v. United States*, 9 Cir., 1928, 23 F. 2d 897; *Gillis v. Welch*, 9 Cir., 1935, 80 F. 2d 165. If, by this law, at the time of the creation of the trust agreement, and, consequently, at the time of Lewis' death, his wife had acquired a 'present, existing and equal interest' California Civil Code, Sec. 161a, then the deficiency was exacted wrongly. \* \* \*

*Bank of America v. Rogan*, 33 F. Supp. 183, at 186.

“Ultimately, the nature of the interest of the wife in community property must be determined, not by reference to the federal tax statutes, but in the light of the property law of California. The management and control, which the husband has under the law of California, does not defeat the

character of the wife's interest as that of a half owner. California Civil Code, Secs. 172, 172a."

Id. p. 188.

---

**(4) THE ADMINISTRATION OF DECEDENT'S ESTATE WAS AND IS A PROCEEDING IN REM, AND BINDING ON THE WHOLE WORLD.**

The property which decedent and his wife owned on and prior to the 23rd day of May, 1941, was community property, so declared in the decree of final distribution of decedent's estate made by the Superior Court of the State of California, in and for the County of Alameda. (Tr. 8, 9.) Also, so declared by decedent in his Will of September 17, 1939. (Tr. 8.)

"The jurisdiction of the probate court is a jurisdiction in rem. It is established when the appropriate petition has been filed and the notice required by the statute has been given. (*Lillienkamp v. Superior Court*, 14 Cal. 2d 293, 298 (93 P. 2d 1008); *Stiebel v. Roberts*, 42 Cal. App. 2d 434, 438 (109 P. 2d 22).)"

*Estate of Wise*, 34 A.C. 441, 447.

"An heirship proceeding is in rem. (*O'Day v. Superior Court*, 18 Cal. 2d 540, 544 (116 P. 2d 621); *Estate of Horman*, 167 Cal. 473, 475 (140 P. 11); *Blythe v. Ayres*, 102 Cal. 254, 258 (36 P. 522).)"

*Estate of Basso*, 79 C.A. (2d) 758, 760, 761;

*Edlund v. Superior Ct.*, 209 Cal. 690, 695;

*C.C.P.* Sec. 1908;

*Probate Code* Sec. 1021.



**(5) THE DECLARATION OF THE DECEDENT IN HIS LAST WILL, DATED SEPTEMBER 17, 1939, THAT ALL OF HIS ESTATE WAS THE COMMUNITY PROPERTY OF HIMSELF AND HIS WIFE, INVESTED ALL OF HIS PROPERTY WITH THE STATUS OF COMMUNITY PROPERTY, IN WHICH THE WIFE HAD A PRESENT, EXISTING AND EQUAL INTEREST.**

Viewed either as (a) the equivalent of an agreement, or (b), as a conveyance in the nature of a gift, the legal effect of the declaration is the same, and is as set forth above.

In his letter of August 31, 1944 (Tr. 17-18), the Commissioner of Internal Revenue took the position that "The statement in the decedent's Will, to the effect that all property was acquired since marriage and the whole thereof was community property, is not equivalent to an agreement made during decedent's lifetime transferring separate property into community property, in which the wife had a vested interest." By necessary implication, the Commissioner concedes that if the wife had given her assent to this declaration, it would be the equivalent of the agreement in the case of *Bank of America v. Rogan*, supra, and only one-half of the property would be includible in the gross estate of the decedent.

(a) We contend that the declaration is the equivalent of an agreement, even though the wife did not evidence her consent by subscribing her signature to it, because as the declaration is entirely for her benefit, the law supplies her consent. It cannot be disputed that the declaration conferred an unqualified benefit upon the wife, and this being the case, it will be presumed that the wife expressly accepted and

agreed to the property status thus created, with the same effect as though she had evidenced her acceptance in writing.

The law of California supporting such a construction is stated in many authorities, but particularly in the case of *Herman v. Mortensen*, 72 C.A. (2d) 413. We quote the following from that case (pages 418-419):

“The second question presented is whether there is evidence of any substantiality to support the implied finding that the grantee accepted or assented to the deed. \* \* \*

There is not a word in the record to indicate that the conveyance was *not* beneficial to the grantee.

Nobody will contend that a grantee is bound to accept or assent to a grant. The reason for the rule with respect to assent has probably never been stated more concisely than it was in *De-Levillain v. Evans*, 39 Cal. 120, 122, as follows: ‘In respect to the question of acceptance by the donee as we understand the civil law, it does not differ materially from the common law. Under neither is the donation valid and obligatory until it is accepted. It may be that the donee does not desire to have the property. There may be burdens growing out of the ownership which he does not choose to assume. If he affirmatively declines to accept the donation the law does not force it upon him against his will. This must be so upon every principle of reason and justice. Nevertheless, in the case of an adult donee, if the donation is for his advantage, he will be presumed to have accepted it unless the contrary appears’.

(Emphasis added.) This case has never been modified or questioned. \* \* \* (Citing authorities.) It was most recently followed in *Estate of Kalt*, 16 Cal. 2d 807, 813 (108 P. 2d 401, 133 A.L.R. 1424), a case involving an adult, where it is said: 'There is no intrinsic difficulty in regarding a conveyance as effective to vest property in the grantee even before the latter has consented to receive it.' (Tiffany, Real Property, 3d ed. Sec. 1055, p. 253; Brown, Personal Property, Sec. 50; Bogert, Trusts and Trustees, Sec. 150, p. 447.) This principle is recognized by the majority of the courts, including those in California, when they hold that a beneficial gift is presumed to be accepted by the donee even without his knowledge or consent. (See Cal. Civ. Code, Sec. 1059, subd. 2; *Neely v. Buster*, 50 Cal. App. 695 (195 P. 736); *DeLevillain v. Evans*, 39 Cal. 120; \* \* \*)”

In the instant case, Mrs. Plummer had nothing to lose and everything to gain from such a declaration in the Will and the creation of such a status. She did not have to do anything about it, affirmatively, to make the declaration binding and final. The law of California did that for her.

It cannot rightly be stated that the contract was “unilateral”, merely because the declaration was made in the last Will of the deceased.

*Herman v. Mortensen*, supra;

*Estate of Belknap*, 66 C.A. (2d) 644, 651;

*Bergman v. Ornbaun*, 33 C.A. (2d) 680;

*Estate of Jameson*, 93 A.C.A. 73, 79, 80.

“It is well settled that a husband and wife may agree with respect to the character of the property which they hold and that they may transmute their property from one status to another by an agreement which ordinarily need not be executed with any particular formality.” (Citing many cases.)

*Estate of Watkins*, 16 Cal. (2d) 793, 797.

In the *Watkins* case, the declarations of the husband and wife were contained in joint wills, executed separately by each of them, and the Court, referring to that situation, stated the following (pp. 797 and 798):

“A single written instrument may constitute both a will and contract (*Security First National Bank v. Stack*, 32 Cal. App. (2d) 586, 90 Pac. (2d) 337; *Norton v. Estate of Norton*, 41 Cal. App. 614, 183 Pac. 214), and we believe that the declarations contained in the joint and mutual will must be held to have constituted an agreement between the spouses *fixing the status of their property as community property*. But even if the declaration found in the joint and mutual will be treated merely as a recital in the written instrument executed by the spouses, the same result must follow as there is a conclusive presumption of ‘The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title;’ (Code Civ. Proc. sec. 1962, subd. 2).” (Emphasis ours.)

By such declaration in the Will, the status of the community property of the parties to the marriage



became fixed and final, and not subject to change, except by the mutual agreement, written or oral, of the husband and wife; and the declaration, being made after 1927, established the status of the property as of the post-1927 type of community property.

“When property is given its community character by agreement, it acquires such characteristic the moment the agreement between the spouses is made.”

*Bank of America v. Rogan*, supra, at p. 188.

In the last cited case, the agreement between the spouses made no statement that their property was to be treated as post-1927 type of community property. The agreement referred in terms only to Section 687 of the Civil Code of California; yet the Court held that under the provisions of the said agreement, executed after 1927, the wife acquired “an ownership of her own definite enough to warrant its exclusion from the husband’s estate.”

Id. 189.

(b) The declaration of the testator in effect is a gift to the wife of “a present, existing and equal interest” in their community property. It was not necessarily a contract.

“The view that assent or acceptance on the part of the grantee is necessary appears to have had its origin, for the most part, in the notion that a conveyance is a contract, and that consequently there must be a meeting of minds. *But a conveyance is not a contract*, and there is no intrinsic difficulty in regarding a conveyance as effective to vest property in the grantee *even be-*



*fore the latter has consented to receive it.”* (Emphasis ours.)

*Tiffany on Real Property*, p. 253, Sec. 1055;  
*Estate of Kalt*, 16 Cal. (2d) 807, 813.

It is therefore immaterial whether or not the declaration is “unilateral” and also immaterial whether or not any “of the fundamentals of a contract inhered in it”. (Words in quotation are from the trial Court’s opinion.) (Tr. 21.)

We direct attention, also, to the fact that the Probate Court, in addition to its affirmative finding that the wife was entitled to one-half of all the community property, further found that: “The said Caroline Alice Plummer is entitled to receive and to have distributed to her one-half of the estate of said deceased, without any deduction therefrom by reason of the payment or discharge of any of the legacies or devises created by the provisions of Paragraphs Fourth and Fifth and the various sub-paragraphs of Paragraph Fifth of said will.” (Tr. 9.)

---

**(6) THE DECLARATION OF THE DECEASED HUSBAND LOSES NONE OF ITS FORCE MERELY BECAUSE IT IS CONTAINED IN HIS WILL.**

It was stated in the trial Court’s opinion that “The will itself was ambulatory.” (Tr. 21.)

That is true only of the testamentary provisions in the Will. It is not true of the binding agreement created by the declaration by the husband of the status

of the property and the presumed acceptance of the wife.

It has also been said that "It (meaning the Will) spoke only as of the date of death and could have been revoked and modified at any time". (Tr. 21.)

That is likewise true only of the testamentary provision in the Will. It is not true of those things that the decedent could not change. Having once created a status of the community property, with the presumed acceptance thereof by the wife, the testator could not thereafter change that status to her detriment, without her consent.

*Civil Code*, Sections 161a, 172, 172a.

"Whenever a testator refers to *an actually existing state of things*, his language should be held as referring to *the date of the Will* and not to his death, as this is then a prospective event." (Emphasis ours.)

1 *Redfield on Wills*, 4th Ed., Sec. 30, p. 386.

"We are not unmindful of the principle that a Will usually speaks as of the time of the death of the testator, yet this is not an unyielding rule. (In *re Swenson's Estate*, 56 N.W. 1115 (Minn.).) This rule must bend to the plain language of the Will."

*In re May's Estate*, 160 N.W. 790.

The effect of words in a Will, fixing the status of property or persons, is not deferred until the date of death. For example, an acknowledgment in his Will by a testator of an illegitimate child is certainly not

dependent upon the testator's death for it to have efficacy.

“On the contrary, such an acknowledgment is a confession of the paternity which at once determines the mutuality of rights and obligations derived from the legal family status; and this fact being acknowledged in an authentic document, it is sufficient that it exist for a single moment in order that it may be irrevocably effective.”

*Roman v. Agosto*, 27 Porto Rico Reports, 529, at 532.

So, also, in *Medel v. Avecillia*, 15 Philippine Rep. 465, we find this quotation from the second paragraph of the syllabus:

“The acknowledgment of a debt, in such a Will, by the testator in favor of another person, although the document may be insufficient as a Will because of the lack of some legal formality required to give it validity, is nevertheless sufficient as written and authentic evidence of the existence of the obligation.”

The language of the Will in the instant case created a *status* of the community property of the deceased and his wife, as of the date of the execution of the Will.

The effect of a declaration in a Will has been passed upon by the Courts of California favorably to our contention.

In *Kopp v. Gunther*, 95 Cal. 63, at 74, the Court said:

“It is true that the instrument in which the will was written also contained a declaration of trust, to which the acceptance of the trust by defendant referred; but the declaration of trust was as effective after the revocation of the will as before, and would have been equally effective if the will had never been valid as a will; that is, if for want of proper attestation or from some other defect, it had never been legally executed.”

In support of the legal effect of a declaration in a Will of a *status*, we refer to the case of *White v. Holden*, 60 S.W. 437 (Tex.), wherein a statement by a testator in his Will that a certain person was his adopted daughter, was held to be sufficient, in the absence of other evidence, to establish such fact.

It has also been held, in California, that the same instrument may operate both as a conveyance and as a Will. In that case, the testator made a declaration in his Will that he had already divided his lands among his sons, which declaration he ratified by the Will. The Court held that title was vested immediately in the sons, and that it was of no consequence that the instrument professed on its face to be a Will.

*Adams v. Lansing*, 17 Cal. 629.

“A writing may be both a will and a contract.”

*Norton v. Estate of Norton*, 41 Cal. App. 614, at 619.

We submit that the declaration by the decedent of the status of his property was not testamentary in character and it had the legal effect of creating a status of post-1927 community property.

“the separate property of either or both spouses may be transmuted into community property without the necessity of any written agreement, and that the intention of the parties that property held in the name of one or the other is to be considered as community property may be shown by *circumstantial*, as well as, direct evidence. (Estate of Sill, 121 Cal. App. 202, 204 (9 P. 2d 243); Williamson v. Kinney, 52 C.A. (2d) 98, 102 (125 P. (2d) 920); Opp v. Frye, 70 Cal. App. (2d) 478, 486 (161 P. 2d 235).)” (Emphasis ours.)

*Frymire v. Brown*, 94 A.C.A. 366, 371.

In *Opp v. Frye*, it was stated:

“Aside from some other evidence, we think this will and waiver are sufficient evidence of such an agreement and of the intention of the parties to change the character of any joint tenancy property here in question so as to permit the same to be disposed of by the will.”

*Opp v. Frye*, 70 Cal. App. (2d) 478, 486.

In *Security First National Bank v. Stack*, 32 C.A. (2d) 586, 592, the Court, in referring to the Will of the deceased husband and the waiver by the surviving wife, of any interest contrary to the terms of the Will, stated that:

“The conditions to which the waiver was subject have been fulfilled. The will was never revoked; the agreement was never terminated either by modification, rescission, performance or otherwise. *The will was effective as of the date of death; the agreement was effective from the date*



*of its execution.* Upon the death of the testator, the agreement, a portion of which is referred to as the waiver and election to take, was as binding upon the defendant widow as the will was upon the executor.” (Emphasis ours.)

In the following case the Court held:

“Accordingly, appellants were entitled to prove by any means available to them that Mr. and Mrs. Jameson intended to convert their joint tenancy holdings into community property. If, as is contended, the spouses made companion wills, *a declaration therein with respect to the community character of the property would tend to prove an agreement between them that they intended it to be so classified.* Clearly such a statement by Mr. Jameson under the circumstances here presented would constitute *a declaration against interest and therefore admissible in evidence against him.* (Code Civ. Proc., Sec. 1870, subd. 2.) See, also, *Mayfield v. Fidelity & Casualty Co.*, 16 Cal. App. 2d 611, 617 (61 P. 2d 83).

“Pursuant to Section 738, Code of Civil Procedure, a will, *whether admitted to probate or not is admissible in evidence in an action to determine adverse claims to real or personal property, when the validity or interpretation of a gift, devise, bequest or trust under such will is involved.*” (Emphasis ours.)

*Estate of Jameson*, 93 A.C.A. 73, 80.

## CONCLUSION.

In conclusion, we cannot help but ask ourselves the question: "In the final analysis, what does all the foregoing add up to?"

We can conceive of but one answer; and that answer is alternative in form, viz.: if the conclusion of the District Court is sustained, that the declaration by the husband of the status of their community property, is "unilateral", or is "ambulatory", or "that it spoke only as of the date of death", or "could have been revoked or modified at any time", or that "none of the fundamentals of contract inhered in it", then it must follow as the night the day that all and any declarations in any Will, no matter on what subject they speak, or no matter that they are statements of present existing facts, and no matter to what extent they may be against self-interest, and even though there be not a single iota of contradictory evidence against the truth and intent of such declarations, nevertheless they are only indications of testamentary intentions, to be given no consideration in fixing or helping to fix property rights as between the testator and others or the obligations financial or otherwise, of the declarant.

The alternative to the above is a very much more reasonable answer, and supported by the many authorities hereinabove cited—that all such declarations be given the value to which they are entitled, measured by the circumstances under which they were made, and especially if they are against self-interest of the

declarant, conferring upon another unconditional benefits.

Dated, San Francisco, California,  
February 17, 1950.

Respectfully submitted,

J. J. LERMEN,

GEORGE DEVINE,

*Attorneys for Appellants.*



declarant, conferring upon another unconditional benefits.

Dated, San Francisco, California,  
February 17, 1950.

Respectfully submitted,

J. J. LERMEN,

GEORGE DEVINE,

*Attorneys for Appellants.*





IN THE

United States Court of Appeals  
For the Ninth Circuit

---

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Sanford Plummer, Deceased; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Caroline Alice Plummer, Deceased, as an individual and distributee; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as trustee and distributee of the Estate of Sanford Plummer, Deceased,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

On Appeal from the United States District Court  
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

---

THERON LAMAR CAUDLE,

Assistant Attorney General,

ELLIS N. SLACK,

LEE A. JACKSON,

MELVA M. GRANAY,

Special Assistants to the Attorney General,

FRANK J. HENNESSY,

United States Attorney,

C. ELMER COLLETT,

Assistant United States Attorney,

*Attorneys for the United States.*

**FILED**

MAR 20 1950

**PAUL P. O'BRIEN,**

**CLERK**



## Subject Index

---

	Page
Opinion below .....	2
Jurisdiction .....	2
Question presented .....	3
Statute involved .....	3
Statement .....	4
Summary of argument .....	11
Argument:	
Paragraph Second of the decedent's will did not operate to require the exclusion of one-half of the community property of decedent and his wife from the decedent's gross estate under Section 811(a) of the Internal Revenue Code .....	13
Conclusion .....	21

## Table of Authorities Cited

<b>Cases</b>	<b>Pages</b>
Anderson v. Commissioner, 78 F. (2d) 636.....	19
Bank of America Nat. Trust & Savings Ass'n v. Rogan, 33 F. Supp. 183 .....	14
Freitas, In re, 16 F. Supp. 557 .....	19
Gump v. Commissioner, 124 F. (2d) 540, certiorari denied, 316 U. S. 697 .....	13, 17
Helvering v. Hickman, 70 F. (2d) 985.....	19
Rogan v. Delaney, 110 F. (2d) 336, certiorari denied, 311 U. S. 660 .....	13
Schwartz v. United States, 70 F. Supp. 437 .....	14, 19
Siberell v. Siberell, 214 Cal. 767 .....	19
United States v. Goodyear, 99 F. (2d) 523 .....	14
United States v. Malcolm, 282 U. S. 792 .....	14
United States v. Robbins, 269 U. S. 315 .....	14
Watkins, Estate of, 16 Cal. (2d) 793 .....	19, 20

## Statutes

California Civil Code:	
Sec. 158 .....	19
Sec. 159 .....	19
Sec. 160 .....	19
Internal Revenue Code, Sec. 811 (26 U.S.C. 1946 ed., Sec. 811) .....	3, 13



No. 12,438

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

CROCKER FIRST NATIONAL BANK OF SAN  
FRANCISCO, Executor of the Last  
Will and Testament of Sanford  
Plummer, Deceased; CROCKER FIRST  
NATIONAL BANK OF SAN FRANCISCO,  
Executor of the Last Will and Tes-  
tament of Caroline Alice Plummer,  
Deceased, as an individual and dis-  
tributee; CROCKER FIRST NATIONAL  
BANK OF SAN FRANCISCO, as trustee  
and distributee of the Estate of San-  
ford Plummer, Deceased,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

On Appeal from the United States District Court  
for the Northern District of California.

**BRIEF FOR THE UNITED STATES.**

**OPINION BELOW.**

The District Court's findings of fact (R. 3-19), conclusions of law (R. 22-23), and opinion contained in its "Order for Judgment" (R. 20-22) are not yet reported.

---

**JURISDICTION.**

The Commissioner determined a deficiency in estate tax against the estate of Sanford Plummer, deceased, in the amount of \$21,874.78, which, with interest, was paid on January 12, 1943, by appellant as executor of the estate. (R. 11.) A timely claim for refund was filed on March 31, 1944 (R. 11-12), and rejected on August 31, 1944. (R. 12, 17-18.) This suit for refund was instituted on July 18, 1946, within the time provided by Section 3772 of the Internal Revenue Code. The District Court had jurisdiction of the case under 28 U.S.C., Section 1346(a)(1), the Collector of the tax not being in office at the time the suit was commenced. (R. 11.) Judgment of dismissal, with costs, was entered by the District Court on August 3, 1949. (R. 24-25.) Motions for a new trial, to open the judgment, amend the findings of fact and conclusions of law, and for the entry of a new judgment were denied on September 22, 1949. (R. 25.) Notice of appeal was filed September 30, 1949 (R. 25-27), and properly invoked the jurisdiction of this Court under 28 U.S.C., Section 1291.

**QUESTION PRESENTED.**

Whether paragraph Second of the decedent's will constituted an agreement between the decedent and his wife which operated to convert their "old type" community property into "new type" community property as of the date of execution of the will, with the result that only one-half of the property in the decedent's name at his death is includible in his gross estate for estate tax purposes under Section 811(a) of the Internal Revenue Code.

---

**STATUTE INVOLVED.**

Internal Revenue Code:

Sec. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest*.—To the extent of the interest therein of the decedent at the time of his death;

\*           \*           \*           \*           \*           \*

(26 U.S.C. 1946 ed., Sec. 811.)

**STATEMENT.**

The findings of fact of the District Court (R. 3-19) may be summarized as follows:

Sanford Plummer (hereinafter referred to as the decedent) and Caroline Alice Plummer were married in California on March 1, 1904. They lived together as husband and wife, and as residents of California, from the time of their marriage until the decedent's death on May 23, 1941. (R. 7.) The decedent left a will which was admitted to probate on June 17, 1941, and under which appellant has since that time served as executor of the decedent's estate.<sup>1</sup> (R. 3-4.) In the estate tax return filed for the estate, appellant returned only one-half of the property owned by the decedent and his wife at the time of the decedent's death. (R. 9-10.) The Commissioner determined an estate tax deficiency of \$21,874.78 on the basis of his determination that not more than 20 percent of the property owned by the decedent and his wife at the time of the decedent's death was community property in which the wife had a present, existing and equal interest. (R. 10-11, 17-18.)

The decedent had filed individual federal income tax returns for the calendar years 1939-1940 and for prior years in which he reported only 20 percent of the income received by him on investments in stocks

---

<sup>1</sup>Appellant was at first co-executor with Caroline Alice Plummer, who died on December 9, 1949. (Br. 2.) By an order of this Court of January 30, 1950, the action was continued as set out in the caption.

and bonds as community income divisible with his wife. (R. 12, 19.) The income tax returns for 1939 and 1940 contained the following statements, (R. 13):

This taxpayer contends that substantially all of his income from dividends constitutes community income in which his wife has a one-half interest. On the basis of revenue agents' reports, covering examinations of taxpayer's income tax return and those of his wife for the years 1935 to 1937, only 20% of income on the above securities is reported as community income.

This taxpayer contends that substantially all of his interest income constitutes a community income in which his wife has a vested one-half interest. In order to avoid a controversy on the basis of revenue agents' reports covering examinations of this taxpayer's income tax returns for the years 1935 to 1937, only 20% of the income on the above securities was reported as community income in this return.

In this connection it was stipulated at the trial that if Scott Dunham, the accountant who prepared the decedent's tax returns, were called as a witness he would testify as follows, (R. 13-16):

"I am now, and for some years last past, have been associated with John F. Forbes & Company, certified public accountants, with offices in the City of San Francisco, and elsewhere throughout the United States.

"I personally knew Sanford Plummer, a resident of the County of Alameda, State of California, who died on May 23, 1941.



“The said Sanford Plummer engaged the services of the said John F. Forbes & Company to prepare his Federal and California individual income tax returns and those of his wife, Caroline A. Plummer, for the calendar years 1939 and 1940.

“Affiant personally gave his attention to the preparation of said returns. In connection therewith, affiant made inquiry of the said Sanford Plummer relating to the community status of property and income of himself and wife. Said Sanford Plummer advised affiant that substantially all of his property constituted community property and he desired to know the distinction between community property acquired prior to July 29, 1927, and community property acquired subsequent to that date.

“Affiant advised Sanford Plummer that community property acquired prior to July 29, 1927, was treated, for Federal and State income tax purposes, as property in which the wife had only an expectancy and that income derived on such property, for Federal and State income tax purposes, was treated as though it constituted the income of the husband. Affiant also advised said Sanford Plummer that community property acquired subsequent to July 29, 1927, exclusive of income derived after that date on community property acquired prior to that date, constituted community property in which husband and wife had equal interests under the provisions of Section 161(a) of the Civil Code. Affiant outlined the policy followed by the Treasury Department and the California Franchise Tax Commissioner in

determining what constituted community property and income acquired subsequent to July 29, 1927.

“Said Sanford Plummer advised affiant that according to the best of his information, a substantial part of his estate consisted of community property acquired subsequent to July 29, 1927. He advised that his former tax adviser had carefully considered this matter and that the Treasury Department had conceded that 20% of his income from dividends and interest constituted community property in which he and his wife had equal one-half interests and that the remainder of the income constituted community income taxable to Sanford Plummer. Said Sanford Plummer advised affiant that, in his opinion, more than 20% of his estate constituted community property in which he and his wife had vested interests. He advised, however, that he did not desire to have further tax controversies or arguments with either the Treasury Department or the State Franchise Tax Commissioner relating to his personal income tax liabilities and those of Mrs. Plummer. According to his instructions, affiant was to treat 20% of the income derived from dividends and interest as community income divisible equally between said Sanford Plummer, and Caroline A. Plummer, his wife. The remainder of the income from these securities was to be treated as community income taxable to said Sanford Plummer. Affiant followed this procedure in preparing the Federal and State income tax returns of Sanford Plummer and of Caroline A. Plummer for the years 1939

and 1940. Pursuant to affiant's conference with Sanford Plummer, affiant did not make an independent investigation in order to determine the community status of property and income owned by said Sanford Plummer.

“There is a note in the files of John F. Forbes & Company to the effect that Revenue Agents' Reports for the years 1935 to 1937 classified 20% of the income received on stocks and bonds as income divisible equally between said Sanford Plummer and Caroline A. Plummer. In light of this fact and of information submitted to affiant by said Sanford Plummer, affiant followed the procedure of classifying 20% of income received on investments in stocks and bonds as divisible community income in filing the income tax returns of Sanford Plummer and Caroline A. Plummer for the years 1939 and 1940.”

On September 17, 1939, the decedent executed a will (R. 7-8), the second paragraph of which provided as follows, (R. 8):

Second. I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer.

After the decedent's death, proceedings in administration of his estate were had in Superior Court and on August 11, 1942, a decree of distribution of the estate was regularly made, filed and entered in the

records of the proceedings. (R. 5.) Among other things, the decree contained the following provisions (R. 8-9):

The Court finds that in Paragraph Second of said Will, the said testator declared that all of the property owned or possessed by him had been acquired since his marriage to his wife, Caroline Alice Plummer, and that the whole thereof was the community property of himself and his said wife, Caroline Alice Plummer, which said declaration of said deceased is confirmed by this Court.

The Court finds that the said testator, under the provisions of paragraph Third of his said Will, confirmed the right of his surviving wife, Caroline Alice Plummer, upon his death, to receive one-half of all the community property and by way of confirming the same, said testator gave, devised and bequeathed to his said wife, Caroline Alice Plummer, the said one-half portion of the said community property.

The Court further finds that the Honorable A. T. Shine, the duly appointed, qualified and acting Inheritance Tax Appraiser of this estate, has filed a report in this estate, which report is now on file herein, wherein it is found by the said Inheritance Tax Appraiser that all of the estate of said deceased was and is the community property of said deceased and his said surviving wife, Caroline Alice Plummer. This Court confirms the said report of the said Inheritance Tax Appraiser that all of the estate of said deceased was and is the community property of said deceased and his said surviving wife, Caroline Alice Plummer.



The Court therefore further finds that the said Caroline Alice Plummer is entitled to receive and to have distributed to her one-half of the estate of said deceased, without any deduction therefrom by reason of the payment or discharge of any of the legacies or devises created by the provisions of Paragraphs Fourth and Fifth and the various subparagraphs of Paragraph Fifth of said Will.

The District Court's ultimate finding of fact was as follows (R. 19):

### XVI.

Not more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of community property acquired by himself and his wife subsequent to July 29, 1927, in which she had a present or "vested" interest at the time of his death.

The judgment of the District Court dismissing the action (R. 24-25) is explained in the District Court's "Order for Judgment" (R. 20-21) and was based upon the following conclusions of law (R. 22):

### I.

The provisions of the will of Sanford Plummer, deceased, did not amount to an agreement between himself and Caroline Alice Plummer, converting either his separate property or their community property acquired prior to July 29, 1927, into the type of California community property in which the wife held a present or "vested" interest within the meaning of Section 161(a) of the California Civil Code.



## II.

That not more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of California community property of the type defined by Section 161(a) of the California Civil Code.

\* \* \* \* \*

---

**SUMMARY OF ARGUMENT.**

Appellant's contention that one-half of the decedent's property is excludible from his gross estate for estate tax purposes is based solely upon the contention that paragraph Second of the decedent's will constituted an agreement between the decedent and his wife which operated, as of the date of execution of the will, to convert their "old type" community property into "new type" community property. However, paragraph Second of the will simply states that the property owned or possessed by the decedent had been acquired since his marriage and was community property. That is merely a statement of a fact which is corroborated by other evidence. It does not purport to state of what type, or what portion of each type, the community property consisted. Thus, if the paragraph constituted an agreement between the decedent and his wife, the agreement was simply that the decedent's property was all community property—that he had no separate property.

Actually, the paragraph in the will could not legally constitute an agreement between the decedent and

his wife. Mutual consent is a requisite to an agreement converting "old type" community property into "new type" community property and there is no showing in the record that the wife even had knowledge of the provisions of the decedent's will prior to his death. Moreover, the will operated only as of the time of the decedent's death and paragraph Second could therefore have been changed. Accordingly, even if the wife had consented to the paragraph, no binding agreement resulted. Appellant's argument to the contrary is that the statement in a will of an existing fact cannot be changed. That argument ignores that appellant is relying on paragraph Second as constituting an agreement which changed an existing fact—that is, which changed "old type" into "new type" community property—and not merely as evidence of an existing fact or of some other written or oral agreement relative to conversion of "old type" into "new type" community property. The existing fact which paragraph Second states is simply that the property owned or possessed by the decedent had been acquired since his marriage and was community property. The statement of that fact obviously does not support appellant's contention that the paragraph constituted an agreement which operated to convert their "old type" into "new type" community property as of the time the decedent executed his will.

## ARGUMENT.

PARAGRAPH SECOND OF THE DECEDENT'S WILL DID NOT OPERATE TO REQUIRE THE EXCLUSION OF ONE-HALF OF THE COMMUNITY PROPERTY OF DECEDENT AND HIS WIFE FROM THE DECEDENT'S GROSS ESTATE UNDER SECTION 811(a) OF THE INTERNAL REVENUE CODE.

As this Court stated in *Rogan v. Delaney*, 110 F. (2d) 336, 337, certiorari denied, 311 U.S. 660:

Formerly, in California, the wife's interest in community property was not a present existing interest, but was a mere expectancy. \* \* \* Now, by § 161a of the Civil Code (added by Stats. 1927, c. 265, p. 484, effective July 29, 1927), it is provided: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband \* \* \*." But § 161a does not apply to community property acquired before July 29, 1927, \* \* \*; nor to property received in exchange for or purchased with the proceeds of such community property, \* \* \*; nor to income derived therefrom, \* \* \*.

Thus, in California, there are two types of community property: (1) Community property in which the wife has a present existing interest and (2) community property in which the wife has no such interest. \* \* \*

Ordinarily, for federal estate tax purposes under Section 811(a) of the Internal Revenue Code, *supra*, the pre-1927, or "old type", community property is includible in its entirety in the husband's gross estate. *Gump v. Commissioner*, 124 F. (2d) 540 (C.A. 9th),

certiorari denied, 316 U.S. 697; *United States v. Goodyear*, 99 F. (2d) 523, 524 (C.A. 9th). Such community property, may however, be converted into post-1927, or "new type" community property by agreement between husband and wife. *United States v. Goodyear*, *supra*; *Schwartz v. United States*, 70 F. Supp. 437 (S.D. Cal.); *Bank of America Nat. Trust & Savings Ass'n v. Rogan*, 33 F. Supp. 183 (S.D. Cal.) If validly converted into "new type" community property, only one-half thereof is includible in the husband's gross estate for estate tax purposes. *United States v. Goodyear*, *supra*; *Bank of America Nat. Trust & Savings Ass'n v. Rogan*, *supra*. The husband's separate property is of course includible in his gross estate in its entirety. Income tax consequences follow the same pattern. The husband is taxable on the income from his separate property and on all income from "old type" community property (*United States v. Robbins*, 269 U.S. 315), but is taxable on only one-half of the income from "new type" community property. (*United States v. Malcolm*, 282 U.S. 792.)

The present case involves an estate tax deficiency resulting from the Commissioner's determination that only 20 percent of the decedent's estate consisted of "new type" community property. That determination was based upon the fact that in 1938 and 1939 the decedent had filed individual income tax returns in which he reported only 20 percent of the income received by him on investments from stocks and bonds



as community income divisible with his wife; that is, as income from "new type" community property. (R. 17-18.)

Appellant contends that the decedent's entire estate consisted of "new type" community property and that, therefore, only one-half thereof is includible in his gross estate. The contention is based solely upon an argument that paragraph Second of the decedent's will constituted an agreement between the decedent and his wife which operated to convert their "old type" community property into "new type" community property as of the date the will was executed, September 17, 1939. Paragraph Second of the decedent's will provided as follows (R. 8):

Second. I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer.

The District Court concluded as a matter of law that this provision did not amount to an agreement between decedent and his wife converting either the decedent's separate property (if any) or their "old type" community property into "new type" community property. (R. 22.) The single inquiry here, as appellant concedes (Br. 6-7), is as to the correctness of that conclusion.

It should be noted at the outset, however, that the record does not show that the decedent ever had any



separate property and that, therefore, there is no basis for a contention by appellant (whether or not made) that paragraph Second of the decedent's will converted separate property into "new type" community property. When Scott Dunham was preparing the decedent's income tax return for either 1938 or 1939, the decedent advised him "that substantially all of his property constituted community property". (R. 14.) At the same time the decedent desired to know, and Dunham explained to him, the distinction between community property acquired prior to July 29, 1927, and community property acquired subsequent to that date. (R. 14-15.) During the conversation the decedent also instructed Dunham to report only 20 percent of his income from dividends and interest as community property divisible with his wife, and thus as income from "new type" community property, in accordance with the Treasury Department's determination in that connection, although he was of the opinion that "more than 20% of his estate" constituted community property in which his wife had a *vested* interest.<sup>2</sup> (R. 15.) Thus,

---

<sup>2</sup>Appellant has not attempted to prove that this opinion of the decedent was correct. The contention here, as previously stated, is that the decedent's estate consisted entirely of "new type" community property by virtue of paragraph Second of the decedent's will.

The decedent's 1938 and 1939 income tax returns contained statements to the effect that he contended that one-half of the income from dividends and interest was derived from "new type" community property (R. 13) but appellant does not rely on these statements, they are inconsistent with the decedent's statements to Dunham, and in any event they are irrelevant to the question whether the decedent had any separate property.

irrespective of paragraph Second of the decedent's will, which may not at that time have been executed, and regardless of what portion of community property in fact constituted "new type" community property, the decedent considered that substantially all of his property was community property. In the probate proceedings with respect to his estate, the Probate Court found that *all* of the decedent's estate consisted of community property. (R. 9.) This finding was based on a report by an inheritance tax appraiser, not on paragraph Second of the decedent's will. Indeed, the Probate Court apparently regarded paragraphs Second and Third of the will as simply confirming the right of decedent's wife to receive one-half of their community property *upon the decedent's death* (R. 8-9)—a right which the wife had as to both "old type" and "new type" community property.<sup>3</sup> Accordingly, the inquiry here is limited to whether paragraph Second of the decedent's will operated to convert "old type" into "new type" community property as of the date of execution of the will.

Paragraph Second of the decedent's will does not even purport to reflect an intention to transform "old type" into "new type" community property. It

---

<sup>3</sup>Perhaps because it was unnecessary to the administration of the estate the Probate Court made no determination as to what part of the decedent's estate constituted "old type" and what part constituted "new type" community property. The fact that the Probate Court determined that the decedent's estate was constituted entirely of community property does not, of course, preclude the inclusion of more than one-half of it in the decedent's gross estate for estate tax purposes. *Gump v. Commissioner*, 124 F. (2d) 540 (C.A. 9th), certiorari denied, 316 U. S. 697.

merely states a fact—that all of the decedent's property had been acquired since his marriage (which occurred in 1904) and was community property. Obviously, therefore, the paragraph provides no basis for appellant's argument that it operated to transform "old type" into "new type" community property.

Nor is there any other basis in the record for a conclusion that the decedent intended the paragraph to have the effect for which appellant argues. The implications are the other way. If the conversation between the decedent and Dunham in connection with the preparation of the decedent's income tax returns for 1938 and 1939, referred to above, occurred prior to the execution of the decedent's will on September 17, 1939, the decedent was well aware of the distinction between the two types of community property before he executed his will and certainly would have been more explicit in paragraph Second if he had intended it to transform "old type" into "new type" community property. If the conversation occurred after the decedent had executed his will on September 17, 1939, which, however, is unlikely, it is apparent that the decedent did not think he had already converted the "old type" into "new type" community property by the provisions in paragraph Second. He instructed Dunham to report 20 percent of his income from dividends and interest as community income divisible with his wife although he was of the opinion that "more than 20% of his estate" (not one-half)

constituted community property in which he and his wife had *vested* interests. (R. 15.)

Assuming contrary to fact that paragraph Second indicates an intention on decedent's part to convert "old type" into "new type" community property, the paragraph was legally ineffective for that purpose. Sections 158, 159 and 160 of the California Civil Code authorize such a conversion but only by an agreement between husband and wife as to which the mutual consent of the parties is a sufficient consideration. *Helvering v. Hickman*, 70 F. (2d) 985, 986 (C.A. 9th); *Anderson v. Commissioner*, 78 F. (2d) 636, 639 (C.A. 9th); *Schwartz v. United States*, 70 F. Supp. 437 (S.D. Cal.); *In re Freitas*, 16 F. Supp. 557 (S.D. Cal.); *Siberell v. Siberell*, 214 Cal. 767, 770; *Estate of Watkins*, 16 Cal. (2d) 793, 797, 108 P. (2d) 417, and cases there cited. The instant record does not show that the decedent's wife was ever aware of the provision in paragraph Second of the decedent's will prior to the decedent's death. It follows that mutual consent is lacking here<sup>4</sup> and it does not aid appellant to rely upon decisions (Br. 14-15) in which there was evidence of an agreement between the parties. Moreover, the decedent's will was unilateral and therefore

---

<sup>4</sup>It is futile for appellant to argue (Br. 11-13) that the law supplies the wife's consent because the declaration in paragraph Second was beneficial to her. While a conveyance may ordinarily be presumed to be accepted by the donee (see Br. 12-13), a transformation of "old type" into "new type" community property can be accomplished only by agreement and mutual consent of the parties and paragraph Second could not constitute an agreement between the decedent and his wife when she had no knowledge of the paragraph.



operative only as of the time of his death and subject to change until that time.<sup>5</sup> Hence, it would be immaterial even if the wife had knowledge of paragraph Second. She could have done no more than assent to its provisions as effective upon the decedent's death. The paragraph resulted in no agreement which was binding upon either party prior to the decedent's death and appellant does not contend that there was any other written or oral agreement between the decedent and his wife of which paragraph Second is evidence.

Appellant argues that paragraph Second was binding and could not be changed (Br. 16-19), but there is no merit to the argument. It is premised upon the assumption that the paragraph referred to an actually existing fact and that assumption ignores that appellant is relying upon the paragraph as constituting an agreement between the parties, and thus as changing the previous status of property, not as evidence of or as a statement of an actually existing fact. Actually, as already noted, the paragraph does indeed state an actually existing fact, but that fact is simply that all of the decedent's property consisted of community property, not that it consisted of "new type" community property. The question here is whether the

---

<sup>5</sup>In this respect the case is different from *Estate of Watkins*, 16 Cal. (2d) 793, 108 P. (2d) 417, relied upon by appellant (Br. 14), which involved joint wills and where, as appellant stated (Br. 14-15), "the status of the community property of the parties to the marriage became fixed and final, and not subject to change, except by the mutual agreement, written, or oral, of the husband and wife".



“old type” community property was converted into “new type” community property through an agreement between the decedent and his wife, and there is nothing in the record to show that it was.

---

### CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Dated, San Francisco, California,  
March 20, 1950.

Respectfully submitted,

THERON LAMAR CAUDLE,

Assistant Attorney General,

ELLIS N. SLACK,

LEE A. JACKSON,

MELVA M. GRANNEY,

Special Assistants to the Attorney General,

FRANK J. HENNESSY,

United States Attorney,

C. ELMER COLLETT,

Assistant United States Attorney,

*Attorneys for the United States.*



No. 12,438

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Sanford Plummer, Deceased; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Caroline Alice Plummer, Deceased, as an individual and distributee; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as trustee and distributee of the Estate of Sanford Plummer, Deceased,

*Appellants,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANTS' REPLY BRIEF.

---

J. J. LERMEN,

GEORGE DEVINE,

806 Balboa Building, San Francisco 5, California,

*Attorneys for Appellants.*

FILED  
MAY 11 1950  
P. O'BRIEN,

CLERK



## Table of Authorities Cited

---

<b>Cases</b>	<b>Pages</b>
Bank of America v. Rogan, 33 Fed. Supp. 183 .....	4, 5, 7, 10
Chase v. Leiter, 96 A.C.A. 468 .....	7
Estate of Jameson, 93 A.C.A. 73 .....	3
Estate of Watkins, 16 Cal. (2d) 793 .....	3, 8
Herman v. Mortenson, 72 Cal. App. (2d) 413 .....	6, 7
Norton v. Estate of Norton, 41 Cal. App. 614 .....	4
Security First National Bank v. Stack, 32 Cal. App. (2d) 586 .....	3, 6

## Texts

Annual Survey of California Law, page 110 .....	8
XIV Southern California Law Review, pages 407, 408.....	4





IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Sanford Plummer, Deceased; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Caroline Alice Plummer, Deceased, as an individual and distributee; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as trustee and distributee of the Estate of Sanford Plummer, Deceased,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLANTS' REPLY BRIEF.**

---

On reading the reply brief of appellee, it became evident that the only question at issue is the legal effect of the provision of the will of the decedent that all of his property was community property of him-

self and wife, as of the date of its declaration, viz.: the date of the execution of the Will, September 17, 1939.

Bear in mind that, under the authorities cited, not by us alone but by counsel for appellee in their brief, the decedent had an absolute right at any time after July 29, 1927, to convert all of his property, whether separate, community or otherwise, into community property of post-1927 type, provided he used apt language in doing so. Bearing that in mind, any and all references to the various statements of *fact*, made in the affidavit of Scott Dunham, and in the statement of *facts* submitted to the Honorable Judge of the District Court, or in the statement of *facts* on this appeal, are entirely beside the point.

Let us assume, for the sake of the argument, that all of these *facts*, as so stated, are true. Nevertheless, the husband, with the consent of his wife, express or presumed, still retained the right, under the law of California, at any time to change the status of his property, no matter what it might have been, to that of community property of the post-1927 type. If the law of California, as cited by both the parties hereto, means anything at all, it means that he had that right, provided only he followed the procedure and the language, oral or written, sufficient so as to express his intent as set up by the law of California.

We submit the following short resume of the language of the Appellate Courts of California in ex-

pressing the rule of law in this State, which must be followed.

In *Estate of Watkins*, 16 Cal. (2d) 793, we find this language at page 797:

“It is well settled that a husband and wife may agree with respect to the character of the property which they hold and that they may transmute their property from one status to another by an agreement which ordinarily need not be executed with any particular formality”, citing eight California cases.

Again in the same case (p. 797):

“A single written instrument may constitute both a will and a contract. (*Security First Natl. Bank v. Stack*, 32 Cal. App. (2d) 586 (90 Pac. (2d) 337); *Norton v. Norton*, 41 Cal. App. 614 (183 Pac. 214) and we believe that the declarations contained in the joint and mutual will must be held to have constituted an agreement between the spouses, fixing the status of their property as community property.”

Then, note the language in this same case, at page 798, where the Court refers to the case of *Security First National Bank v. Stack*, 32 Cal. App. (2d) 586:

“The Court there held that the declaration in the will and the wife’s consent thereto terminated the joint tenancies and fixed the character of the property as community property.”

Again, in *Estate of Jameson*, 93 A.C.A. 73, 80, note the following language:

“A declaration therein (namely, companion wills) with respect to the community character of the property would tend to prove an agreement between them that they intended it to be so classified.”

In *Norton v. Estate of Norton*, 41 Cal.App. 614, at page 619, we find the following language:

“A writing may be both a will and a contract. For the purposes of the present appeal, it is immaterial whether it is operative for testamentary purposes or not. It is executed with all of the formalities required in the execution of a contract and a suit may be maintained upon it, without regard to its testamentary character.”

And, finally, in the case of *Bank of America v. Rogan*, 33 Fed. Supp. 183, may we call attention to the language of the written agreement between the spouses, to be found in XIV Southern California Law Review at pages 407 and 408. The agreement is dated February 15, 1932 and contains the following language in part:

“Said Parker M. Lewis is possessed of certain property which is, in fact, owned and held by him as his sole and separate estate \* \* \* It is agreed \* \* \* that all that certain property \* \* \* is hereby declared to be owned and held by these parties in community in the same manner and to the same effect as if acquired by the parties hereto during coverture from the joint earnings of these parties, as contemplated in Section 687 Civil Code of California.”



Note, also, paragraph V of the findings (p. 407), that Parker M. Lewis and Elizabeth Lewis were married in the State of California on the 26th day of January, 1925, two years and a half before Section 161a became effective on July 29, 1927.

Note, also, the language of paragraph XIII of the findings (p. 411):

“It is not true that the interests therein of decedent’s wife at the time of his death were valueless and insofar as the ownership, possession and enjoyment by the wife of a one-half interest in said community property is concerned, it is immaterial whether the same was acquired before or after July 29, 1927.”

And again in finding XXIII (p. 414):

“It is true that *prior* to decedent’s death, Elizabeth Lewis became the *absolute owner* of an undivided one-half interest in said property with equal rights of possession and enjoyment of the whole thereof.”

We submit, therefore, that the only difference between the *Bank of America v. Rogan* case and the instant case is that in the former case, the agreement is in a separate document, signed by both husband and wife, and in the instant case the agreement is contained in the will of the decedent, confirmed by the provisions of the decree of final distribution of decedent’s estate by the Superior Court in and for the County of Alameda. (T. 8, 9.) In neither of the cases is there any attempt made to refer to any dis-

inction between so-called pre-1927 type and post-1927 type of community property. Yet, in the decision in the *Rogan* case, notwithstanding the absence of any such express declaration, the Court held that the wife acquired "an ownership of her own, definite enough to warrant its exclusion from the husband's estate." (Page 189.)

Again, in *Security First National Bank v. Stack*, 32 Cal. App. (2d) 586, the Court said, page 592:

"The *will* was effective as of the date of death; the *agreement* was effective from the date of its execution."

And finally, we again direct the Court's attention to *Herman v. Mortenson*, 72 Cal. App. (2d) 413, and the citations therein of many cases from the Appellate Courts of California, categorically upholding the instruction of the lower Court to the jury that "The law presumes that the grantee has accepted the grant or gift even though he has no knowledge of it or there is no express consent to such gift where such gift would be beneficial to such grantee." (p. 418.) (Appellants' brief, 12 and 13.)

In our opening brief (pages 12 and 13) we quoted at length from the case of *Herman v. Mortenson*, supra, because the rule laid down therein and the principle of law therein declared have a direct bearing upon the single issue of law before this Court in this case. Yet, eminent counsel for appellee have not deigned to refer to the case, either directly or indirectly. Is the principle of law therein enunciated and its applicability to the lone issue of law in this case

to be so easily brushed off as not worth even passing attention? Yet, counsel dwell upon the fact that the consent of the surviving wife does not *expressly* appear, either orally or in writing.

But the status of her interest in the community property, so declared, was and is absolutely unconditional; there were no burdens attached thereto; and under the rule declared in said case, *Herman v. Mortenson*, such an *express* consent was not necessary. It will be conclusively presumed unless negated by evidence to the contrary. If the declaration means anything at all, it means that the husband gave to his wife a present, vested and equal interest in their community property, just as effectively as though the wife's acceptance of such a declaration, made for her benefit, was expressed in writing, as in the case of *Bank of America v. Rogan*, *supra*. Otherwise, the said declaration was nothing but an empty gesture.

But an empty and idle gesture is hardly conceivable in the execution of a will. The making of one's will is a most solemn act and seriously considered, and from which all such things as idle and empty gestures are barred.

As this reply brief was being written, there came to our attention the recent (March 13, 1950) decision in the case of *Chase v. Leiter*, 96 A.C.A. 468. In that case, a husband and wife made a joint and mutual will, declaring that, although some of their property was held in joint tenancies, all of their property was community property. The will left the property to

certain trustees, and after the husband's death the wife asserted a claim as surviving joint tenant.

The District Court of Appeal, citing with approval *Estate of Watkins*, supra, said (p. 478):

“The will was a contract which became effective as soon as executed.” (p. 478.)

And, quoting from Annual Survey of California Law (p. 110), stated:

“The cases of the last year (1948-49) continue to reflect the view \* \* \* that agreements or understandings entered into during marriage as to property acquired or to be acquired may be \* \* \* effective to constitute it community property.” (p. 479.)

Counsel for appellee contend that Paragraph Second of the decedent's will reflects no intention to convert “old type” community property into “new type.” In support of this, they advance an alternative that the conversation concerning community property between the decedent and his accountant, Scott Dunham, occurred either before or after September 17, 1939, the date of the execution of the will; and they conclude that it is unlikely that the conversation took place after September 17, 1939. (Br. 18.) This conclusion is based upon the erroneous premise set forth by counsel for appellee, to-wit, that Scott Dunham and the firm of John F. Forbes and Company were employed to prepare decedent's income tax returns for the years 1938 and 1939. The fact is, however, that these accountants were engaged to prepare his income tax returns for 1939 and 1940 (R. 14), and not for



1938. Prior to the preparation of his 1939 return, he had had another tax adviser. (R. 15.) The conversation concerning the types of community property between Sanford Plummer and Scott Dunham must therefore, in the nature of things, have occurred between December 31, 1939 and March 15, 1940.

We shall therefore answer the argument of counsel based upon the alternative that the conversation was had after the execution of the will. Counsel say (Br. 18) that if the conversation occurred after the execution of the will on September 17, 1939, it is apparent that the decedent did not think that he had already converted the "old type" community property into "new type". Counsel for the appellee point out, in support of this contention, that the deceased instructed Dunham to report 20 per cent of his income as community income, but counsel neglect to mention that this was done by the decedent only to avoid further controversies or arguments with the Treasury Department. (R. 15.) Therefore, no significance should be attached to the fact that the 1939 and 1940 returns reported only 20% of the income as being from property in which the wife had a vested interest; and this for the reason that the decedent was willing to pay the tax rather than to argue against it.

In view of the determined stand taken by the Commissioner in the case at bar, it is morally certain that if Sanford Plummer, in his income tax returns filed in March, 1940 and March, 1941, had returned all of his income as post-1927 type, he would have been met



with a barrage of objections, which, as appears from Dunham's affidavit, the deceased wished to avoid.

The appellee also contends that, assuming that Paragraph Second of the will indicates an intention to convert "old type" into "new type" community property, the paragraph was legally insufficient for that purpose, because, as appellee contends, such a conversion can be accomplished only by agreements and mutual consent of the parties, and Paragraph Second could not constitute an agreement between decedent and his wife, when she had no knowledge of the paragraph. (Br. 19, note 4.)

In this position, appellee overlooks entirely the presumption of assent to a beneficial grant, which presumption supplies the consent of the wife.

We feel that we have answered, and we hope convincingly, all of the arguments of counsel for appellee. We have endeavored to support our construction of the legal effect of the declaration of decedent in Paragraph Second of his will by applicable decisions of the Appellate Courts of California and the case of *Bank of America v. Rogan*, supra, decided in the United States District Court for the Southern District of California.

Dated, San Francisco, California,  
March 31, 1950.

Respectfully submitted,

J. J. LERMEN,

GEORGE DEVINE,

*Attorneys for Appellants.*

No. 12439

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

ERNEST B. LOPEZ,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
Southern District of California,  
Central Division.

FILED

MAR 9 - 1950

PAUL P. O'BRIEN,  
CLERK









No. 12439

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

ERNEST B. LOPEZ,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
Southern District of California,  
Central Division.



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Designation of Contents of Record on.....	40
Notice of.....	37
Statement of Point and Designation of Contents of Record on.....	44
Statement of Points to Be Relied Upon on	38
Supplement to Statement of Points to Be Relied Upon on, and Designation of Con- tents of Record on.....	41
Certificate of Clerk.....	42
Designation of Contents of Record on Appeal.	40
Exhibit D—Reporter's Transcript of Proceed- ings .....	13
Findings of Fact, Conclusions of Law, and Or- der on Motion.....	31
Indictment .....	2
Judgment and Commitment.....	6
Minute Order Dated November 7, 1949.....	30
Motion to Vacate Judgment and Sentence on Count Two.....	8

INDEX	PAGE
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	37
Statement of Point and Designation of Con- tents of Record on Appeal.....	44
Statement of Points to Be Relied Upon on Ap- peal .....	38
Supplement to Statement of Points to Be Re- lied Upon on Appeal, and Designation of Contents of Record on Appeal.....	41
Verdict of the Jury.....	5

## NAMES AND ADDRESSES OF ATTORNEYS

### For Appellant:

ERNEST B. LOPEZ,  
in pro per  
P.M.B. 697  
Alcatraz, Calif.

### For Appellee:

ERNEST A. TOLIN,  
United States Attorney,  
NORMAN W. NEUKOM,  
LEILA F. BULGRIN,  
Assistants U. S. Attorney,  
600 U. S. Post Office & Court House  
Bldg.,  
Los Angeles 12, Calif.



In the District Court of the United States in and  
for the Southern District of California, Central  
Division

No. 16048

February Term, 1943

INDICTMENT

(Viol.: 18 USC 101; 18 USC 88—Receiving  
stolen property; conspiracy.)

In the Name and by the Authority of the United  
States of America, the Grand Jury for the  
Southern District of California, at Los Angeles,  
presents on oath in open Court:

That Ernest Lopez and Salvador Herrera, here-  
inafter called the defendants, heretofore, to-wit:  
On or about May 31, 1943, at Los Angeles, County  
of Los Angeles, California, within the district and  
division aforesaid, did knowingly, wilfully, unlaw-  
fully and feloniously receive, conceal and have in  
their possession with intent to convert the same to  
their own use and gain, certain property of the  
United States, to-wit: Approximately 967 "A,"  
"B," "C," "T-1," "T-2" and "R" gasoline ration-  
ing books prepared and printed for issuance by the  
Office of Price Administration, an agency of the  
United States of America, a more particular de-  
scription of which said property is to the Grand  
Jury unknown, which said property had been  
theretofore unlawfully and feloniously stolen and  
purloined from the United States, as the said  
defendants then and there well knew;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [2\*]

Count Two

And the Grand Jury aforesaid, upon its oath aforesaid, does further present:

That Ernest Lopez and Salvador Herrera, hereinafter called the defendants, prior to the date of the commission of the first overt act hereinafter set forth and continuously thereafter to and including the date of finding and presentation of this indictment, in Los Angeles County, California, within the Southern District of California, Central Division, and the jurisdiction of the United States and of this Honorable Court, did then and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other, and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States of America and the laws thereof, that is to say, to receive, conceal and have in their possession with intent to convert the same to their own use and gain, property of the United States, to-wit: gasoline rationing books prepared and printed for the Office of Price Administration, an agency of the United States, which property had been unlawfully and feloniously stolen from the United States, as the said defendants well knew, in violation of

Title 18, Section 101 of the United States Code; and to transfer and assign gasoline rationing coupon books and gasoline rationing coupons to persons not entitled to accept such transfer or assignment of gasoline rationing books or coupons under the provisions of Ration Order 5C issued by the Office of Price Administration, an agency of the United States, pursuant to the Second War Powers Act of 1942;

And the Grand Jury aforesaid, upon its oath aforesaid, does further charge and present that at the hereinafter stated times in pursuance of, and in furtherance and execution of, and for the purpose of carrying out and to effect, the object, design and purposes of said [3] conspiracy, combination, confederation and agreement aforesaid, the hereinafter named defendants did commit the following overt acts at the hereinafter stated places:

1. On or about March 25, 1943, at Los Angeles, California, defendants Ernest Lopez and Salvador Herrera delivered a number of gasoline rationing books printed for issuance by the Office of Price Administration, the exact number of which is to the Grand Jury unknown, to Balter M. Oliver;

2. On or about April 1, 1943, at Los Angeles, California, defendant Ernest Lopez delivered a number of gasoline rationing books printed for issuance by the Office of Price Administration, the exact number of which is to the Grand Jury unknown, to William H. Summers;

3. On or about May 26, 1943, at Los Angeles,

California, defendant Ernest Lopez delivered fifty gasoline rationing books printed for issuance by the Office of Price Administration to William H. Summers.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

/s/ CHARLES H. CARR,  
U. S. Attorney.

Filed June 16, 1943. [4]

---

In the District Court of the United States, in and  
for the Southern District of California, Central  
Division

No. 16048 Crim.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

ERNEST LOPEZ,  
Defendant.

### VERDICT OF THE JURY

We, the jury in the above entitled case, find the defendant, Ernest Lopez, Guilty as charged in the first count of the Indictment, and Guilty as charged in the second count of the Indictment.

Dated: Los Angeles, Calif., July 29th, 1943.

/s/ LEON A. WHITE,  
Foreman of the jury.

[Endorsed]: Filed July 29, 1943. [6]

District Court of the United States, Southern  
District of California, Central Division

No. 16048

United States

- vs.

Ernest Lopez

(Criminal indictment in 2 counts for violation  
of U. S. C., Title 18, Secs. 101 and 88.)

### JUDGMENT AND COMMITMENT

On this 30th day of July, 1943, came the United States Attorney, and the defendant Ernest Lopez appearing in proper person, and with counsel and,

The defendant having been convicted on verdict by the jury of the offenses charged in the indictment in the above-entitled cause, to-wit: On or about May 31, 1943 at Los Angeles, California, receive, conceal, and have in his possession with intent to convert same to his own use and gain, certain property of the United States to-wit approximately 967 "A," "B," "C," "T-1," "T-2" and "R" gasoline rationing books prepared and printed for issuance by the Office of Price Administration, an agency of the United States, and conspiracy so to do and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, hav-



ing been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative for the period of five years on the first count of the indictment, and be imprisoned in said institution for the period of two years on the second count of the indictment. Imprisonment imposed on the second count of the indictment shall begin at the expiration of the term imposed on the first count of the indictment. The total term of imprisonment under this judgment is seven years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ LEON R. YANKWICH,  
U. S. District Judge.

Filed this 30th day of July, 1943.

EDMUND L. SMITH,  
Clerk,

By /s/ LOUIS J. SOMERS,  
Deputy Clerk.

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AND  
SENTENCE ON COUNT TWO

May It Please the Court:

Comes now the movant, Ernest B. Lopez, and moves this Honorable Court to vacate judgment and sentence on Count Two, which sentence was imposed in violation of the Constitution of the United States of America.

Statement of Facts

On June 16, 1943, movant was indicted in the above-entitled [12] Court for a violation of Title 18, U.S.C., Sections 101 and 88.

Upon his original arraignment under the indictment, movant plead not guilty thereto.

On July 30, 1943, movant was convicted by a jury, and was sentenced to five (5) years on Count One for violation of Title 18, U.S.C., Section 101, and for a period of two (2) years on Count Two for violation of Title 18, Section 88, which sentences were to run consecutively, making a total of seven (7) years. No appeal followed.

Movant's Contentions

The movant's contentions are:

That the judgment and sentence of two (2) years imposed on Count Two of the indictment was imposed in violation of the Fifth and Sixth Amend-

ments to the Constitution of the United States of America, and that the imposition of said sentence was beyond the jurisdiction of this Honorable Court for the reason that:

(a) That the jury's verdict was returned and is contrary to the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the movant due process of law in that:

The jury rendered a general verdict on Count Two of the indictment, which charged a conspiracy to violate two distinct and separate statutes, whereas one of these clauses does not state an offense against the United States for the reason that no overt act is charged therein or stated as required by law, making this clause totally invalid, thus leaving entirely to guess and presumption any determination as to which of the two clauses, [13] to-wit: the valid or the invalid one, the jury based its findings on.

(b) That he was denied a fair and impartial trial by jury as guaranteed and provided under the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the movant due process of law in that:

The jury was not even partially informed, much less fully informed as required by law, on the statute and the elements thereof which the movant was alleged to have conspired to violate; that the jury therefore could not know what act of the movant's, if any at all, would or did constitute a violation of the statute; that said jury thus being left in ignor-

ance of the law, could not have reached a verdict in strict adherence to the Fifth and Sixth Amendments to the United States Constitution.

### Request for Judicial Notice of Court's Records

This motion is based upon the indictment and judgment and sentence and court instructions to the jury, and jury's verdict on file in Criminal Case No. 16048. A Court can and will take judicial notice of its own records. See: *Crescuolo v. Atlas Imperial Diesel Engine Co.* (C.C.A. 9th) 84 Fed. 2d 273 (cited in *Procedure and Jurisdiction*).

Wherefore, your movant respectfully prays that this Honorable Court vacate judgment and sentence on Count Two imposed upon movant in the above-entitled cause for reasons hereinafter stated. [14]

### Jurisdiction

Movant is entitled to file this motion under the authority of and in conformity with the provisions contained in the New Title 28, U.S.C., Section 2255—effective September 1, 1948, which provides:

“A prisoner in custody under sentence of a Court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may

move the court which imposed the sentence to vacate, set aside or correct the sentence.”

A motion for such relief may be made at any time.

“Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. \* \* \*” [15]



[Title of District Court and Cause.]

OATH OF VERIFICATION

State of California,

City and County of San Francisco—ss.

Ernest B. Lopez, being first duly sworn deposes and says: That he is the movant in the above said cause by him subscribed. He knows the contents thereof to be true of his own knowledge except to matters stated upon reliable information, and as to such matters he believes them to be true.

/s/ ERNEST B. LOPEZ,

Movant pro-se.

Subscribed and sworn to before me this 30th day of Aug., 1949.

[Seal] /s/ B. MADIGAN,

Associate Warden, United States Penitentiary,  
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Ernest Lopez is a citizen of the United States.

[Endorsed]: Filed September 6, 1949. [16]

EXHIBIT D

In the District Court of the United States in and  
for the Southern District of California, Central  
Division

No. 16048-B-Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST LOPEZ,

Defendant.

Honorable Leon R. Yankwich, Judge presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Thursday, July 29, 1943

Appearances:

For the Plaintiff:

CHARLES H. CARR, Esq.,

U. S. Attorney,

By JAMES M. CARTER, Esq.,

Assistant U. S. Attorney.

For the Defendant:

JOHN A. HOLLAND, Esq.,

PHILIP S. SCHUTZ, Esq. [18]

Court's Charge to the Jury

The Court: Gentlemen of the jury, I want you  
to listen very attentatively to the instructions on

## Exhibit D—(Continued)

the law given you by the court. These instructions are all written out. I shall read them very slowly and clearly so you will understand. No one will be allowed to come or to go out of the court room until it is completed. If there is anyone who desires to retire, you had better retire now, because you will not be allowed to leave until the jury has gone out.

I may say for your information, if you have not served before, that the instructions of the court will be available to you upon request and they will be sent out to you if after you begin your deliberations you desire to have them before you. So will also any exhibits that you may want, and so will also a copy of the indictment if you desire to refresh your recollection as to that, although I may say that the instructions are very clear. I segregated those which apply to both cases, those which apply to Count One and those which apply to Count Two, so you will not have any difficulty whatsoever in determining what is necessary in order to find a verdict as to either of the counts in the indictment.

The law of the United States permits a judge to [19] comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the

## Exhibit D—(Continued)

facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge [20] against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassion-

## Exhibit D—(Continued)

ately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

The offenses with which the defendant is charged are: Receiving stolen public property and conspiracy.

In this connection, you are instructed that the indictment on file herein is a mere charge or accusation against the defendant, and is not any evidence of the defendant's guilt and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged, considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the [21] case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to



## Exhibit D—(Continued)

speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point, and the jury, being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony [22] with distrust and suspicion, and reject all unless they shall be convinced that, notwithstanding the base character of the witness, he or she has, in other particulars, sworn to the truth.

You are instructed that the law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

## Exhibit D—(Continued)

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure; it is an essential substantial part of the law and binding on you in this case.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find the defendant not guilty.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of [23] all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of

## Exhibit D—(Continued)

jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in his own behalf, his testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, and the tests for determining credibility of witnesses as given you, in another part of the instructions, are to be applied to his testimony alike [24] with that of all other witnesses.

You are instructed that Count 1 of the indictment charges the offense contained in Section 101, Title 18 United States Code Annotated, which provides that

“Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been, embezzled, stolen, or purloined by any

## Exhibit D—(Continued)

other person, knowing the same to have been so embezzled, stolen, or purloined \* \* \*”

shall be punished according to law.

The statute makes it a crime (1) to conceal or receive property of the United States Government, knowing the same was stolen, and (2) to retain property, knowing that the same was stolen. Count 1 of the indictment charges the first offense—feloniously receiving and concealing stolen property.

The Court instructs you that ration books and coupons are of government issue and the property of the United States Government.

To convict under this count it is essential to prove (1) that the ration books and coupons were stolen, and (2) that the accused received and concealed them, knowing them [25] to have been stolen, at the time he received and concealed them.

It is not necessary to show that the defendant stole them.

Mere concealment of the ration books and coupons is not sufficient. It must be done with knowledge that the ration books and coupons had been stolen.

Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession and, though only prima facie evidence of guilt, may be of controlling weight, unless explained by the circumstances or accounted for in some way consistent with innocence.

You are instructed that Count 2 of the indict-

## Exhibit D—(Continued)

ment charges the offense contained in Section 88, Title 18 United States Code Annotated, which provides that

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall \* \* \*”

be punished according to law.

In order to warrant you in finding a verdict of guilty against the defendant on trial, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as [26] charged in the indictment was entered into between the particular defendant and at least one other person to violate the law of the United States in the manner described in the indictment. It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the conspirators or at their direction or with their aid.

Under the charge made, the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before a defendant can be convicted, that he was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the



## Exhibit D—(Continued)

time that an act was committed, if the evidence shows that there was such. The mere fact that a defendant named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant was a party to the conspiracy and unlawful agreement before his guilt of the offense charged is made out.

Each party to a conspiracy must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one [27] act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other

## Exhibit D—(Continued)

essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if a defendant, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, he would [28] be guilty.

As to the conspiracy count, you will be called upon to consider, as to the defendant on trial, among other things, the following questions:

Was there a conspiracy as charged in the indictment for the objects, or any of them, therein alleged?

If there was such a conspiracy, was the defendant a party to it?

Did the defendant, after the formation of the conspiracy, if such was formed, or another conspirator, commit the overt acts, or any of them, as alleged in the indictment?

If the evidence satisfies you, beyond a reasonable doubt, of the existence of said conspiracy, and that said overt acts were committed by the particular defendant or another conspirator, as alleged in the indictment, and that the particular defendant

## Exhibit D—(Continued)

was a party to said conspiracy when said overt acts were committed, you will find him guilty as charged in the indictment; if, however, the evidence fails to so satisfy you of the existence of said conspiracy, or of the commission of any of the said overt acts as alleged in the indictment, or that the particular defendant was a party to such conspiracy when any of said overt acts were committed, then and in that event, you will find the particular defendant not guilty. [29]

By the term “overt act” as used in these instructions, is meant any act committed by any one or more of the conspirators, if the evidence shows there was in fact a conspiracy, which act was intended to and had a tendency to forward the purpose of the conspiracy. Such act may be an agreement between two or more of the conspirators, if the evidence shows there was a conspiracy, or it may be of any act performed by any one of the conspirators, if there was a conspiracy, that would have a tendency to forward the purpose of the conspiracy and the intent of the conspirators or that would have a tendency to accomplish the purpose of the conspiracy.

Your first duty upon retiring to the jury room will be to select one of your number to act as foreman in the case.

The jury in Federal cases is what is known as a common law jury. It requires unanimity before a verdict can be returned. In other words, all 12

## Exhibit D—(Continued)

of you must agree before a verdict can be returned upon either count of the indictment.

For your assistance the clerk has prepared a form of verdict which is entitled in the court and cause. I will not read that portion. It reads:

“We, the jury in the above-entitled case, find the defendant, Ernest Lopez, ..... as charged in the first count of the Indictment, and [30].....  
..... as charged in the second count of the Indictment.

“Dated: Los Angeles, Calif., July ...., 1943.

.....,

“Foreman of the Jury.”

If you find the defendant guilty as charged in Count One of the Indictment, you will insert the word “guilty.” If you find him not guilty as to Count One, you will insert those words. If you find him guilty as to Count Two, you will insert the word “guilty” there. And if you find him not guilty as to Count Two, you will insert the proper words.

It is not necessary that the same verdict be found as to both counts in the indictment.

Whichever your verdict is, when arrived at by all of you it must be dated, signed by your foreman, and returned to this court.

Are there any exceptions to the charge given by the court?

Mr. Schutz: No, your Honor.

The Court: The Government?

## Exhibit D—(Continued)

Mr. Carter: The Government is satisfied.

The Court: The clerk will swear the bailiffs.

(Two bailiffs were sworn by the clerk to take charge of the jury.)

The Court: You will now be taken into custody by the [31] officers of this court and begin your deliberations in this case.

Court will stand at recess until the return of the jury.

(The jury retired from the court room at 5:00 o'clock p.m. in custody of the bailiffs and returned into the court room at 5:25 p.m. of the same day.)

The Court: Let the record show that the jury has returned to the court room and the defendant is in court with his counsel.

Gentlemen of the jury, have you arrived at a verdict?

Juror White: We have, your Honor.

The Court: Will you hand the verdict to the bailiff, please? The clerk will read the verdict.

(The clerk read as follows:)



Exhibit D—(Continued)

“In the District Court of the United States in  
and for the Southern District of California,  
Central Division

No. 16048 Crim.

“UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

“ERNEST LOPEZ,  
Defendant.

VERDICT OF THE JURY

“We, the jury in the above-entitled case, find  
the defendant, Ernest Lopez, guilty as charged in  
the first count of the Indictment, and guilty as  
charged in the second count of the Indictment. [32]

“Dated: Los Angeles, Calif., July 29th, 1943.

“LEON A. WHITE,  
“Foreman of the Jury.”

So say all of you?

The Court: The clerk will enter and record the  
verdict.

Gentlemen of the jury, we desire to thank you for  
the time you have given us in this case, and you  
will be excused until notified.

What is the desire of counsel in regard to sen-  
tence?

## Exhibit D—(Continued)

Mr. Holland: If your Honor please, at this time I would like to ask that there be a pre-sentence investigation of the defendant and that all of the facts may come before the court.

The Court: I do not think I need a pre-sentence investigation in this case. Any facts you may want to call to my attention, you may. As I say, I am leaving for San Diego and will not be back until August. And any facts in the record of this defendant can be promptly presented tomorrow at 2:00 o'clock. I will set the imposition of sentence for that time.

In the meantime I will exonerate the bail and the defendant here will be taken into custody at this time.

Mr. Holland: Before your Honor makes that statement—I can understand how your Honor feels, but I took this matter up this afternoon with the bondsmen and they were willing that he remain on bond. [33]

The Court: Not in a case of this character. The defendant will be taken into immediate custody.

Mr. Holland: At 2:00 tomorrow?

The Court: 2:00 tomorrow. I would make it Saturday but we have a meeting of judges and I cannot do it.

I will be glad to hear anything you have to say about this man's record, and the United States Attorney will also present anything he desires.

Mr. Carter: Could we dispose of all the exhibits in the case by stipulation?

## Exhibit D—(Continued)

The Court: Not at the present time, no. No; I would not do that until sentence time has elapsed. We never do that in a case of this character until the defendant is sentenced at least. [34]

## REPORTER'S CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct partial transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of September, A.D. 1947.

/s/ ALBERT H. BARGION,  
Official Reporter. [35]

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 7th day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,  
District Judge.

[Title of Cause.]

For hearing defendant's motion to vacate judgment and sentence on count 2; S. L. Johnson, Esq., Ass't U. S. Att'y, appearing as counsel for Gov't; Philip Gordon, Esq., heretofore appointed, appearing as counsel for defendant;

Court orders cause continued to 2 p.m. At 2 p.m. court reconvenes herein and all being present as before, including counsel for both sides;

Attorney Gordon argues to the Court. Hand-written copy of movant's reply brief is filed. Court makes a statement and orders said motion denied.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER ON MOTION PUR-  
SUANT TO 28 U.S.C., SECTION 2255

The Motion of the defendant filed September 6, 1949, to Vacate the Judgment and Sentence imposed July 30, 1943, on Count Two of the Indictment having come on for hearing and having been heard by the Court on November 7, 1949, after Notice given to the United States Attorney and without requiring the attendance of the defendant at the hearing, the Court now determines the issues and makes the following Findings of Fact, Conclusions of Law and Order with respect thereto:

Findings of Fact

It appears from the Motion filed by the defendant on September 6, 1949, from the files and records in this case and from the affidavits and other evidence adduced upon the hearing of this motion, and the Court accordingly finds:

I.

On June 16, 1943, an Indictment was returned by the Grand Jury and filed in this Court charging the defendant in two counts as follows: Count One charged [37] the violation of 18 U.S.C., Section 101; Count Two charged a violation of 18 U.S.C. Section 88.

Thereafter on June 25, 1943, defendant was regularly arraigned and entered pleas of Not Guilty to the offenses charged in the said two counts of



the indictment. At the time of the arraignment and plea and during the trial of this case, defendant was represented by John Holland and Phillip S. Schutz, attorneys at law.

## II.

Thereafter on July 27th and 29th, 1943, the defendant was tried before a jury and was found guilty as charged in both counts of the indictment. Subsequently, on July 30, 1943, defendant appeared with his counsel for sentencing. The Court duly ordered and adjudged that the defendant, having been found guilty by the jury, be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five years in the penitentiary on Count One and two years in the penitentiary on Count Two, the sentences to run consecutively.

## III.

Thereafter on October 8, 1945, defendant filed a motion to vacate judgment and sentence. On October 22, 1945, this Court made and entered an order denying defendant's motion to vacate judgment and sentence. On November 6, 1945, defendant filed a notice of appeal from said order denying the motion to vacate judgment. In addition to his notice of appeal, the defendant filed in the District Court an application for leave to prosecute in forma pauperis the appeal sought to be taken by him from the order denying his motion. However, the District Court also denied that application

on November 13, 1945. On November 29, 1945, an opinion was filed by the Circuit Court of Appeals for the Ninth Circuit dismissing the defendant's appeal from the order of October 22, 1945.

#### IV.

Thereafter on September 6, 1949, defendant filed another motion to vacate judgment upon which these findings and order are based. Phillip Gordon, attorney at law, was appointed by the Court to represent the defendant on said motion. [38]

#### Conclusions of Law

From the foregoing Findings of Fact, and from the files and records in this case, the Court makes the following Conclusions of Law:

##### I.

The lapse of a period of six years between the date of defendant's conviction in the District Court and the date of the filing of this motion to vacate judgment is a sufficient bar to the vacation of defendant's judgment and conviction on his motion under Section 2255 of Title 28, U.S.C.A.

##### II.

The defendant's designations of error that the verdict of the jury as rendered was a denial of due process of law as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States of America, and that he was denied a fair and impartial trial by jury as guaranteed under

the Fifth and Sixth Amendments, in that the instructions given to the jury by the Trial Court were erroneous, cannot be raised upon a motion to vacate judgment under Section 2255 of Title 28, U.S.C.A., since a motion to vacate judgment under Section 2255 cannot be used to review the proceedings of the trial as upon appeal.

### III.

The Court at said hearing considered the alleged deficiencies in the instructions on the merits. Upon such consideration the Court concludes that the instructions given by the Court defined adequately the offenses charged in both counts of the indictment in the very language of the statutes under which the said counts were drawn. In addition thereto, the Court in very elaborate instructions fully set forth the elements necessary to constitute an offense under each count of the indictment. The instructions in said case were written and are on file in said case. They show, and the Court concludes that unlike the cases upon which the petitioner relies, the jury in the present case were fully and adequately instructed as to the law governing each of the offenses set forth in the indictment.

### IV.

Defendant was not denied due process of law or a fair and impartial trial by jury guaranteed under the Fifth and Sixth Amendments of the United States [39] Constitution or either of them.

## V.

It is, therefore, concluded that the Motion of the defendant must be denied.

## ORDER

By reason of the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered that the Motion of the defendant, Ernest B. Lopez, Filed September 6, 1949, to Vacate the Judgment and Sentence imposed on or about July 30, 1949, for the offense charged in Count Two of the Indictment, upon all grounds stated in said Motion, be and the same is hereby denied.

It Is Further Ordered that the defendant be and is hereby advised that the provisions of Section 2255 of Title 28 of the United States Code accord him the right of an appeal to the Court of Appeals from this order denying his Motion, and the defendant is further informed that Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides in part that:

“An appeal by a defendant may be taken within ten (10) days after entry of the judgment or order appealed from \* \* \* When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant.”

It Is Further Ordered that the Clerk this day serve a copy hereof by United States Mail on the

defendant, Ernest B. Lopez, [PMB 697, Alcatraz, California.]

Done in Open Court this 28th day of November, 1949.

/s/ LEON R. YANKWICH,  
U. S. District Judge.

Approved as to Form:

ERNEST A. TOLIN,  
U. S. Attorney.

NORMAN W. NEUKOM,  
Assistant U. S. Attorney,  
Chief of Criminal Division.

LEILA F. BULGRIN,  
Assistant U. S. Attorney,  
Attorneys for U. S. of A.

PHILIP GORDON,  
Attorney for Ernest B. Lopez.

[Endorsed]: Filed Nov. 28, 1949.



In the District Court of the United States for the  
Southern District of California, Central Division

Cr. No. 16048

UNITED STATES OF AMERICA,

Respondent,

vs.

ERNEST B. LOPEZ,

Movant.

NOTICE OF APPEAL

Please take notice, that above-named movant hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the United States District Court for the Southern District of California, Central Division, entered in the office of the Clerk of said Court on November 28, 1949, denying Movant's motion to vacate judgment and sentence on count two (2) in Criminal Case No. 16048, and from each and every part of said order as well as from the whole thereof.

Respectfully submitted,

/s/ ERNEST B. LOPEZ,

Movant Appellant, pro se.

Copy Mailed U. S. Atty., Nov. 28, 1949.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON ON APPEAL

Movant-Appellant intends to rely upon the following points on this appeal.

1. The jury rendered a general verdict on Count Two of the indictment, which charged a conspiracy to violate two distinct and separate statutes, whereas one of these clauses does not state an offense against the United States for the reason that no overt act is charged therein or stated as required by law, making this clause totally invalid, thus leaving entirely to guess and presumption any determination as to which of the two clauses, to wit: the valid or the invalid one, the jury based its findings on.

2. The jury was not even partially informed, much less fully informed as required by law, on the statute and the elements thereof which the movant was alleged to have conspired to violate; that the jury therefore could not know what act of the movants, if any at all, would or did constitute a violation of the statute; that said jury thus being left in ignorance of the law, could not have reached a verdict in strict adherence to the Fifth and Sixth Amendments to the United States Constitution.

3. That he was denied a fair and impartial trial by jury as guaranteed and provided under the Fifth and Sixth Amendments to the Constitu-

tion of the United States of America, denying the movant due process of law.

4. That the jury's verdict was returned and is contrary to the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the movant due process of law.

5. That the judgment and sentence of two (2) years imposed on Count Two of the indictment was imposed in violation to the Constitution of the United States of America, and that the imposition of said sentence was beyond the jurisdiction of this Honorable Court.

6. The District Court erred in denying the Motion to Vacate the judgment and sentence under Count two of the indictment No. 16048.

/s/ ERNEST B. LOPEZ,

Appellant in propria persona.

Dated: November 21, 1949.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

Ernest B. Lopez, the movant-appellant above named, hereby designates the following record in the above-entitled cause for inclusion in the record on appeal, the same include therein the following:

1. Motion to Vacate Judgment and Sentence on Count two filed on September 6, 1949 (omitting the brief in support).

2. Exhibit "A" consisting of the indictment No. 16048.

3. Exhibit "B" consisting of the Jury's verdict.

4. Exhibit "C" consisting of the Judgment and Sentence.

5. Exhibit "D" consisting of Instructions to Jury.

6. Notice of Appeal.

7. The Court's order of November 7, 1949, denying said Motion.

8. Finding of fact and conclusions of law.

9. Memorandum opinion (none filed).

10. This Designation of Contents of Record on Appeal.

11. Statement of Points to be Relied Upon on Appeal.

12. Clerk's Certificate.

Dated: November 21, 1949.

/s/ ERNEST B. LOPEZ,  
Movant-Appellant  
In Propria persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 28, 1949.

---

[Title of District Court and Cause.]

SUPPLEMENT TO STATEMENT OF POINTS  
TO BE RELIED UPON ON APPEAL, AND  
DESIGNATION OF CONTENTS OF REC-  
ORD ON APPEAL

Ernest B. Lopez, the movant-appellant above named, hereby supplements his Statement of Points to be Relied Upon on Appeal, and his Designation of Contents of Record on Appeal.

Statement of Points to Be Relied Upon Appeal

7. Motion To Vacate Under 2255 of the new Title 28 is not barred by lapse of six years since conviction. "Motion can be filed at any time." (Title 28, Section 2255.)

8. Motion to Vacate Under 2255—Title 28 can be granted at any time when the records on file show that the movant-appellant jury was not once told or instructed as to what United States laws or statute the movant-appellant was charged and was



being tried for conspiring to violate, because such error goes to the jurisdiction and violates the right of due process under the Fifth Amendment and the right to a fair and impartial trial under the Sixth Amendment.

9. That the Court erred in not making Findings of Facts, and Conclusions of Law, as required under Sec. 2255 of Title 28, on movant-appellant first point raised in his Motion to Vacate.

Movant-Appellant hereby supplements his designation of contents of record on appeal with the following:

13. This "Supplement To Statement of Points to be Relied Upon On Appeal, and Designation of Contents of Record on Appeal."

14. Clerk's Certificate.

Dated: December 5, 1949.

/s/ ERNEST B. LOPEZ,  
Movant-Appellant,  
In Propria Persona.

Copy Mailed U. S. Atty. Dec. 7, 1949.

[Endorsed]: Filed December 7, 1949.

---

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Cali-

fornia, do hereby certify that the foregoing pages numbered from 1 to 46, inclusive, contain the original Indictment; Verdict of the Jury; Judgment and Commitment; Motion to Vacate Judgment and Sentence on Count Two and Exhibit D thereto consisting of reporter's transcript of Proceedings on July 29, 1943 (Exhibits A, B and C are omitted as they are but certified copies of the Indictment, Verdict of the Jury and Judgment and Commitment, the originals of which are certified as a part of the record); Findings of Fact, Conclusions of Law and Order on Motion Pursuant to 28 U. S. C., Section 2255; Notice of Appeal; Statement of Points to be Relied Upon on Appeal; Designation of Contents of Record on Appeal and Supplement to Statement of Points to be Relied Upon on Appeal and Designation of Contents of Record on Appeal and a full, true and correct copy of Minute Order Entered November 7, 1949, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fee for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27th day of December, A.D. 1949.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

[Endorsed]: No. 12439. United States Court of Appeals for the Ninth Circuit. Ernest B. Lopez, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 28, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

---

In the United States Court of Appeals  
for the Ninth Circuit

No. 12439

ERNEST B. LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINT AND DESIGNATION  
OF CONTENTS OF RECORD ON APPEAL

Appellant intends to rely upon the following points on this appeal.

1. The jury rendered a general verdict on count two of the indictment, which charged a conspiracy to violate two distinct and separate statutes, whereas one of these clauses does not state an offense

against the United States for the reason that no overt act is charged therein or stated as required by law, making this clause totally invalid, thus leaving entirely to guess and presumption any determination as to which of the two clauses, to wit: the valid or the invalid one, the jury based its findings on.

2. The jury was not even partially informed, much less fully informed as required by law, on the statute and the elements thereof which the appellant was alleged to have conspired to violate; that the jury therefore could not know what act of the appellant, if any at all, would or did constitute a violation of the statute; that said jury thus being left in ignorance of the law, could not have given a fair trial and reached a verdict in strict adherence to the Fifth and Sixth Amendments to the United States Constitution.

3. That he was denied a fair and impartial trial by jury as guaranteed and provided under the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the appellant due process of law.

4. That the jury's verdict was returned and is contrary to the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the appellant due process of law.

5. That the Judgment and Sentence of (2) years imposed on Count two of the indictment was imposed in violation of the Fifth and Sixth Amend-





IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ERNEST B. LOPEZ,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

ERNEST A. TOLIN,

*United States Attorney,*

NORMAN W. NEUKOM,

*Assistant United States Attorney,*

*Chief of Criminal Division,*

SANDER L. JOHNSON,

*Assistant United States Attorney,*

600 U. S. Postoffice and Court House Building,  
Los Angeles 12, California,

*Attorneys for Appellee.*



## TOPICAL INDEX.

	PAGE
Jurisdictional statement .....	1
Statement of the case.....	2
Statute .....	2
Statement of facts.....	4
Question involved .....	4
Argument .....	5
A failure to instruct as to one of two substantive offenses concerning which a conspiracy is charged may not success- fully be collaterally attacked.....	6
Conclusion .....	15

# TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Atkinson, Ex parte, 84 Fed. Supp. 300.....	7
Baker v. Utecht, et al., 161 F. 2d 304; cert. den., 331 U. S. 856 and 332 U. S. 831; reh. den., 332 U. S. 845.....	11
Barrett v. Hunter, 180 F. 2d 510.....	5
Bruno v. United States, 180 F. 2d 393.....	5
Calp v. United States, 83 Fed. Supp. 152.....	14
Chereton v. United States, 161 F. 2d 808; cert. den., 332 U. S. 765 .....	12
Diggs v. Welch, 148 F. 2d 667; cert. den., 325 U. S. 889.....	14
Eury v. Huff, 141 F. 2d 554.....	10
Franzeen v. Johnston, 111 F. 2d 817.....	14
Gebhart v. Hunter, 89 Fed. Supp. 336.....	5
Howell v. United States, 172 F. 2d 213.....	6
Kenion v. Gill, 155 F. 2d 176.....	12, 13
Meyers v. Welch, 179 F. 2d 707.....	5, 7
Michener v. Johnston, 141 F. 2d 171.....	13, 14
Morris v. United States, 156 F. 2d 525, 169 A. L. R. 305.....	13
Samuel v. United States, 169 F. 2d 787.....	10, 13
Sunal v. Large, 332 U. S. 174.....	6, 8
United States v. Kranz, 86 Fed. Supp. 776.....	7
United States v. Moore, 166 F. 2d 102; cert. den., 334 U. S. 849 .....	5
United States v. Rockower, 171 F. 2d 423.....	5
United States v. Sturm, 180 F. 2d 413.....	5

## STATUTES

Ration Order 5C.....	6, 9, 11, 14, 15
United States Code, Title 18, Sec. 88.....	2
United States Code, Title 18, Sec. 101.....	2
United States Code, Title 28, Sec. 2255.....	1, 2, 5, 6

## TEXTBOOKS

169 American Law Reports, p. 305.....	13
---------------------------------------	----

No. 12439.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ERNEST B. LOPEZ,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

### Jurisdictional Statement.

(A) On September 6, 1949, appellant filed in the District Court of the United States for the Southern District of California, Central Division, a "Motion to Vacate Judgment and Sentence." Said court had jurisdiction to hear this motion pursuant to Section 2255 of new Title 28 of the U. S. Code, under which it was filed.

(B) Under the provisions of said Section 2255 of new Title 28, this court has jurisdiction of the appeal from the decision of the District Court, of November 7, 1949, denying the said motion to vacate judgment and sentence.



## Statement of the Case.

The appellant was prosecuted for a violation of old Title 18, U. S. C., Section 101 (receiving stolen property), and on a second count for violation of old Title 18, U. S. C., Section 88 (conspiracy), in the United States District Court for the Southern District of California, Central Division [T. 2-5]. After a plea of not guilty to each count of the indictment, he was convicted by a jury and sentenced by the court on July 30, 1943, to five years imprisonment in a Federal penitentiary on the first count (18 U. S. C., Section 101), and two years on the second count (18 U. S. C., Section 88), to run consecutively [T. 5-7]. No appeal was taken.

On September 6, 1949, appellant filed a motion to vacate judgment and sentence, under Section 2255 of the new Title 28, U. S. C. [T. 8-12], which was denied by the court on November 11, 1949 [T. 31-36]. Thereafter, on November 28, 1949, "Notice of Appeal" was filed by the appellee [T. 37-39].

## Statute.

"28 U. S. C., Sec. 2255 (New). Federal custody; remedies on motion attacking sentence. A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution, of laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to

collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

“A motion for such relief may be made at any time.

“Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

“A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

“The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

“An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of *habeas corpus*.

“An application for a writ of *habeas corpus* in be-

half of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”

### **Statement of Facts.**

The facts concerning commission of the crimes for which the defendant was convicted are not in issue in this appeal from the order of the District Court denying the appellant's motion to vacate judgment, since the only purpose of the motion to vacate judgment is to determine whether or not the judgment and conviction are void on the face of the record. See cases and authorities hereinafter cited.

### **Question Involved.**

May failure to instruct on the elements of an offense involved in a conspiracy charge be raised in a collateral attack upon judgment and conviction thereof?

## ARGUMENT.

At the time of the hearing in the Federal District Court on appellant's motion to vacate judgment and sentence, there appeared to be some basis for contesting it on the ground that since it is a remedy in the nature of the ancient writ of error *coram nobis* (Revisor's Notes, Section 2255, new Title 28, U. S. C.), it must be exercised with reasonable diligence and thus could not, despite the language of Section 2255, "be made at any time." See:

*United States v. Moore*, 7 Cir., 166 F. 2d 102 (Feb. 27, 1948), cert. den. 334 U. S. 849;

*United States v. Rockower*, 2 Cir., 171 F. 2d 423 (Dec. 27, 1948).

However subsequent decisions interpreting Section 2255, including that cited in appellant's opening brief (p. 7), establish that a motion thereunder may indeed be made at any time; and except for the requirement it be brought in the trial court, such motion is a more or less exact counterpart of the petition for a writ of *habeas corpus*. See:

*Bruno v. United States*, C. A. D. C., 180 F. 2d 393 (January 23, 1950);

*Barrett v. Hunter*, 10 Cir., 180 F. 2d 510 (February 14, 1950);

*Meyers v. Welch*, 4 Cir., 179 F. 2d 707 (January 14, 1950);

*United States v. Sturm*, 7 Cir., 180 F. 2d 413 (March 7, 1950);

*Gebhart v. Hunter*, 89 Fed. Supp. 336 (March 16, 1950).

Thus appellee concedes point one raised and discussed in appellant's brief (pp. 6-7).

Because of the point last made, *i. e.*, that the motion to vacate may be based upon the same general grounds as a petition for a writ of *habeas corpus*, cases concerned with either or both remedies are cited interchangeably herein, as equal authority, in connection with the issues involved.

**A Failure to Instruct as to One of Two Substantive Offenses Concerning Which a Conspiracy Is Charged May Not Successfully Be Collaterally Attacked.**

Appellant's contentions to the effect that the trial court omitted an instruction or definition concerning the involved offense under Ration Order 5C (App. Op. Br. pp. 7-10) admittedly are sustained by the record herein. Accordingly the sole issue now under consideration is whether or not such omission may successfully be made the basis of a collateral attack upon the judgment. Appellant has cited no case dealing directly with this issue, arising either from a petition for a writ of *habeas corpus* or a motion to vacate judgment under Section 2255. Even assuming that the court's omission to instruct as aforesaid constituted prejudicial error, it may of course be taken as elementary that a petition for writ of *habeas corpus* (or motion to vacate judgment) may not be substituted for an appeal.

*Sunal v. Large*, 332 U. S. 174.

One case cited by appellant in his opening brief (p. 15), *Howell v. U. S.*, 3 Cir. 172 F. 2d 213, cert den. 337, 906, (January 12, 1949) seems particularly applicable in this connection. Noting that matters raised by appellant



should have been called to the attention of the trial court and if necessary made the basis of an appeal, the court there said:

“It is elementary that neither habeas corpus nor motion in the nature of application for writ of error *coram nobis* can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, *even though such errors relate to constitutional rights*. It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error *coram nobis* or under 28 U. S. C. A. 2255. *Birtsch v. United States*, 4 Cir., 164 F. 2d 880; *Pifer v. United States*, 4 Cir., 158 F. 2d 867; *Eury v. Huff*, 4 Cir., 141 F. 2d 554; *Sanderlin v. Smyth*, 4 Cir., 138 F. 2d 729; *United States v. Brady*, 4 Cir., 133 F. 2d 476, 481.” (Emphasis supplied.)

See also:

*U. S. v. Kranz*, 86 Fed. Supp. 776;

*Ex parte Atkinson*, 84 Fed. Supp. 300.

A most recent case dealing with the same general problem may also be cited. This was *Meyers v. Welch*, *supra*, 179 F. 2d 707, where the court had under consideration an appeal from an order dismissing a petition for writ of *habeas corpus*. Considering the merits of the petition, the court said, at page 709:

“In the second place, it is perfectly clear that habeas corpus does not lie to correct mere errors of law in a trial or to try such questions as the sufficiency of the evidence to sustain a conviction *or the refusal to instruct the jury as to the applicable law*.” (Emphasis supplied.)

In these connections, *Sunal v. Large*, 332 U. S. 174, becomes pertinent. There, as here, the petition for writ of habeas corpus did not rely on facts dehors the record and therefore not open to consideration and review on appeal; there, as here, a significant decision rendered subsequent to appellant's conviction contained language appearing to give him new or strengthened rights (332 U. S. 177.) Referring to the rule that a writ of habeas corpus will not be allowed to do service for an appeal, the court said, at page 179:

“Yet, on the other hand, where the error was flagrant *and there was no other remedy available for its correction*, relief by habeas corpus has sometimes been granted.” (Emphasis supplied.)

Referring further to the fact that the exact question presented had in another case been decided subsequent to time for appeal from appellant's conviction, the court went on to say:

“The case therefore is not one where the law was *changed* after the time for appeal had expired. Cf. *Warring v. Colpoys*, 122 F. 2d 642. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized. Of course, if *Sunal* and *Kulick* had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile.” (Emphasis supplied.)

The court then added:

“It is not uncommon after a trial is ended and the time for appeal has passed to discover that *a shift in the law or the impact of a new decision* has given increased relevance to a point made at the trial but not pursued on appeal. *Cf. Warring v. Colpoys, supra.* If in such circumstances habeas corpus could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by habeas corpus, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.” (P. 182; emphasis supplied.)

Thus, assuming further that the omission to instruct upon the provisions of Ration Order 5C touched upon the constitutional rights of the appellant, it may not properly be made the subject to a collateral attack, providing the substance of a fair trial was had by appellant.

The bedrock issue here then is whether or not, on the record now presented, it appears that appellant *was* denied the very substance of a fair trial.

In this connection appellant relies upon certain language in the decision of this court in *Samuel v. United States*,

169 F. 2d 787, which did not involve a collateral attack upon a judgment but which, in view of the language quoted therefrom by appellant (App. Br. p. 15), certainly has "the impact of a new decision."

Significantly, in the *Samuel* case not only was a direct appeal involved, but the appellants had in the trial objected to the erroneous instruction given and had proffered instructions more in accordance with what the court of appeals found to be required; thus they had at all stages of the proceedings preserved the very point they urged on appeal.

In trial of the case at hand appellant was represented by counsel of his own choosing [T. 13], and upon completion of the court's instructions to the jury no exceptions thereto were noted by his counsel [T. 15]. It would seem that the full import of this, and the question whether appellant was denied the very substance of a fair trial, may not be determined without reference to those cases having to do with waiver of constitutional rights by a defendant or his counsel. In *Eury v. Huff*, 4 Cir., 141 F. 2d 554, petitioner sought relief under writ of habeas corpus on the ground that a jury which convicted him was composed of only ten men. The records showed that his counsel had agreed to waive the constitutional requirement of twelve, and proceed with but ten; petitioner claimed he did not know he was entitled to twelve and that the consent he gave thereto was thus vitiated. The court noted that there was nothing to indicate his attorney was lacking in this "elementary knowledge," or that any advantage was taken either of him or the petitioner, and went on to

hold that there had been a valid waiver of the constitutional right to a jury of twelve, and that the judgment of the court based upon the verdict accordingly was not subject to attack. Further, it was held that the question was one that could only have been raised in the original cause, not collaterally by petition for release on habeas corpus.

Likewise in the case of *Baker v. Utecht, et al.*, 8 Cir., 161 F. 2d 304, cert den. 331, U. S. 856, and 332 U. S. 831, reh. den., 332 U. S. 845, there was involved a petition for release by habeas corpus on the ground petitioner had not been given a public trial in violation of his constitutional rights. Said the court, quoting upon the point the Minnesota Supreme Court (p. 305):

“\* \* \* By contrast, however, the denial of the right to a public trial (in a part of the proceeding), where the accused enjoys the benefit of competent counsel at every stage of the proceeding, does not *ipso facto* involve a violation of the due process clause and operate as a jurisdictional bar to a valid judgment of conviction. In the latter case, the court is complete and the accused enjoys ample corrective processes through appeal.’”

The Court of Appeals for the Sixth Circuit, in a recent decision, considering an appeal wherein appellant attacked judgment upon the ground that the court erred in failing to instruct upon the offense alleged (Ration Order 5C as amended), went so far as to hold “As to the second contention, appellant’s counsel candidly admits that he did not request the court to charge the jury in the words or



substance of the statute; that the court charged as he requested, and that he took no exception. The charge, taken as a whole, presents no reversible error.”

*Chereton v. U. S.*, 6 Cir., 161 F. 2d 808, 809, cert. den. 332 U. S. 765.

As before emphasized, appellant in his opening brief has cited no case dealing with collateral attack upon a judgment on the ground of failure to instruct as to the elements of the offense involved, and counsel for appellee has been able to find none other than those above cited, and that of *Kenion v. Gill*, C. A. D. C., 155 F. 2d 176. There, on appeal from denial of a writ of habeas corpus, appellant contended that the instructions by the judge to the jury were so inadequate as to deny him due process of law and that by such denial the court had lost jurisdiction to enter judgment. Recognizing that “it is reversible error for the trial court to fail to define the various crimes involved in the indictment and to fail to define the elements of each, to the extent necessary to permit the jury to apply the law to the facts,” the court went on to say that the particular instructions, on careful examination of the entire record, were not open to successful collateral attack by habeas corpus proceedings. In the course of its opinion it stated, at page 179,

“It is also established that the writ may be used in those exceptional cases where the conviction has been in disregard of the Constitutional rights of the accused *and where the writ is the only effective means of preserving the rights of the accused; as where the facts relied on are dehors the record, and their effect on the judgment is not open to consideration and review on appeal.*” (P. 179; emphasis supplied.)

The court noted too that no exception to the contested instruction had been made by counsel during trial and that there had been no further request as to instructions upon the offense involved.

The entire subject of the trial court's duty to explain and define the offense charged in a criminal prosecution is discussed in a lengthy and complete annotation in 169 A. L. R. 305; this was an annotation to the decision of this court in *Morris v. U. S.*, 156 F. 2d 525, 169 A. L. R. 305. Upon consideration of the authority herein cited, it will appear to the court that there is indeed a contrast between situations discussed in such annotation and that of the appellant in this matter. The difference here of course lies in the facts that appellant was represented by counsel of his own choosing; that in the trial court no objection was made to the instructions as given; and that appellant now seeks collaterally to attack the judgment herein by virtue of the impact of certain language contained in a recent decision, several years subsequent to his conviction (*Samuel v. U. S.*, *supra*, 169 F. 2d 787). Further the instructions which were actually given must be considered in the light of all circumstances attendant upon the trial (see *Kenion v. Gill*, *supra*, 155 F. 2d 176); and in any event the appellant has the burden of showing conclusively that he is entitled to the relief sought. (See *Michener v. Johnston*, 9 Cir., 141 F. 2d 171.)

The court may well consider, even in the absence of a showing in the record herein to such effect, the times during which indictment was brought and trial had in this



No. 12441

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

HUGO V. LOEWI, INC., a corporation,

Appellant,

VS.

KILIAN W. SMITH,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
for the District of Oregon.

FILED

MAR 9 - 1950

PAUL P. O'BRIEN,  
CLERK





No. 12441

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

HUGO V. LOEWI, INC., a corporation,

Appellant,

vs.

KILIAN W. SMITH,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
for the District of Oregon.



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit .....	358
Amended Answer.....	40
Answer to Motion for Consolidation of Records	358
Appeal:	
Appellee's Designation of Additional Con- tents of Record on.....	81
Appellee's Designation of Additional Parts of the Record Considered Material on...	352
Concise Statement of the Points on Which Appellant Intends to Rely on.....	348
Designation of Contents of Record on....	78
Designation of the Portions of the Record Which Appellant Thinks Necessary for Consideration of Points to Be Relied Upon .....	349
Notice of.....	57
Order Extending Time for Filing Record on, and Docketing.....	61, 82
Statement of Points on Which Defendant Intends to Rely on.....	62

INDEX	PAGE
Appellee's Designation of Additional Contents of Record on Appeal.....	81
Appellee's Designation of Additional Parts of the Record Considered Material on the Ap- peal .....	352
Clerk's Certificate.....	344
Complaint .....	2
Exhibit A—Agreement .....	10
B—Agreement .....	19
Concise Statement of the Points on Which Ap- pellant Intends to Rely on Appeal.....	348
Designation of Contents of Record on Appeal.	78
Designation of the Portions of the Record Which Appellant Thinks Necessary for Con- sideration of Points to Be Relied Upon....	349
Docket Entries.....	83
Findings of Fact and Conclusions of Law....	47
Conclusions of Law.....	55
Findings of Fact.....	48
Judgment .....	56
Memorandum of Decision.....	46
Motion for Consolidation of Records.....	354
Motion to Dismiss, to Strike and for More Defi- nite Statement.....	36

INDEX

PAGE

Names and Addresses of Attorneys of Record.	1
Notice of Appeal.....	57
Notice of Extension to File Petition and Bond for Removal of Cause.....	29
Notice of Motion.....	38
Order Extending Time for Filing Record on Appeal and Docketing Appeal .....	61, 82
Order of Removal.....	34
Order Reserving Decision on Motion.....	39
Order for Transmittal of Exhibits.....	80
Petition for Removal of Cause to the District Court of the U. S. for the District of Oregon	30
Reply to Counterclaim.....	39
Statement of Points on Which Defendant In- tends to Rely on Appeal.....	62
Stipulation With Respect to Printing of Ex- hibits .....	346
Supersedeas Bond.....	58
Transcript of Testimony and Proceedings....	87
Witnesses, Defendant's:	
Byers, James A.	
—direct .....	219
—cross .....	225
—redirect .....	228



## INDEX

## PAGE

## Witnesses, Defendant's—(Continued):

## Eismann, Howard

—direct .....	284
—cross .....	288
—redirect .....	290

## Fry, Lamont

—direct .....	194, 207
—cross .....	208

## Hoerner, G. R.

—direct .....	266
—cross .....	269
—redirect .....	270
—recross .....	272

## Oppenheim, Robert

—direct .....	290
—cross .....	309
—redirect .....	321
—recross .....	323

## Paulus, C. W.

—direct .....	228, 274
—cross .....	241, 276
—redirect .....	261
—recross .....	263

## Ray, Harold W.

—direct .....	272, 277
—cross .....	280
—redirect .....	283

INDEX

PAGE

Witnesses, Plaintiff's:

Aman, Wilbert

—direct .....	187
—cross .....	191
—redirect .....	193

Bullis, D. E.

—direct .....	326
—cross .....	336
—redirect .....	342

Cornoyer, H. A.

—direct .....	177
—cross .....	185
—redirect .....	186
—recross .....	186

Smith, Kilian W.

—direct .....	94, 325
—cross .....	131, 326
—redirect .....	175



NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

ROBERT M. KERR,

STUART W. HILL,

KERR & HILL,

Room 802, Equitable Building,  
Portland, Oregon,

Attorneys for Appellant.

MAGUIRE, SHIELDS, MORRISON & BAILEY,

ROY F. SHIELDS,

RANDALL B. KESTER,

WILLIAM E. DOUGHERTY,

723 Pittock Block,  
Portland 5, Oregon,

Attorneys for Appellee.

In the Circuit Court of the State of Oregon  
for the County of Marion

No. 34864

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for his First cause of action alleges:

I.

At all times herein mentioned plaintiff operated a farm known as "the old Novvak farm" located about 2½ miles northwest of Donald on the Aurora-Newberg Highway in Marion County, Oregon. During the 1947 season, about 10 acres of said farm were planted in Cluster hops, and about 24 acres were planted in Fuggle hops.

II.

At all times herein mentioned defendant was, and now is, a corporation incorporated under the laws of the State of New York, with its home office located at 33 Water Street, New York City, New York. Defendant has never qualified under the laws of Oregon to carry on business in Oregon as a foreign corporation.



## III.

Defendant's business consists mainly in buying and selling hops. During all the times herein mentioned defendant was and is transacting such business in Oregon. Each of plaintiff's causes of action herein alleged arose in Marion County, Oregon. None of the officers of defendant resides or has an office in said county. Defendant's principal agent in Oregon was, and is, C. W. Paulus who resides and has his place of business in Salem, Marion County, Oregon.

## IV.

On or about August 19, 1947, defendant inspected plaintiff's said Cluster hops growing on said farm. Thereafter, on said date, defendant entered into a contract in writing with plaintiff whereby plaintiff agreed to sell, and defendant agreed to buy, said entire crop of said Cluster hops grown on said farm during 1947. Said contract contained the terms and conditions as set out in "Exhibit A" attached hereto and hereby made a part hereof.

## V.

Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed except to the extent that such performance was waived by defendant, or prevented by its acts or conduct as herein alleged. Plaintiff duly completed the cultivation, harvesting, drying, curing and baling of all of said Cluster hops grown on said farm during 1947, in accordance with said

contract. Pursuant to said contract, defendant advanced to plaintiff \$3,000.00 to apply on the purchase of said Cluster hops.

#### VI.

On or about August 26, 1947, while plaintiff was picking said Cluster hops, defendant again inspected them. Any defect which said hops may have had by reason of blight was apparent to defendant at the time of said inspection. Defendant instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance on defendant's said instruction.

#### VII.

On or about September 15, 1947, after said Cluster hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant, delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said Cluster hops and set same aside for defendant. Thereupon, defendant sampled and weighed in said hops.

#### VIII.

Said Cluster hops so weighed in by defendant consisted of 73 bales, and had a total net weight, as determined by defendant, of 14,112 pounds. Pursuant to said contract on or about September 18, 1947, plaintiff selected as the sale price for said Cluster hops the grower's market price at that time, and notified defendant in writing thereof. The sales price for said Cluster hops, so determined as pro-

vided by said contract, was 85 cents per pound. Said contract provided, however, that if the leaf and stem content was from 8% to 10% then said price would be reduced 1 cent per pound for each 1% increase in said leaf and stem content over 8%. The contract provided for the determination of said leaf and stem content by an authorized governmental agency. Pursuant to said contract said 73 bales of said Cluster hops so set aside for, and weighed in by defendant at said warehouse were inspected by the United States Department of Agriculture and found to have a leaf and stem content of 9%. The contract sales price for said Cluster hops was accordingly 84 cents per pound.

## IX.

Thereafter general market prices of Cluster hops began a downward trend and continued to decline until they reached a level of about one-half of said contract price of 84 cents per pound. While said market prices were so declining, on or about October 16, 1947, defendant refused to pay for plaintiff's said Cluster hops on the stated grounds that they were dirty picked and badly blighted, and on no other specific ground. Said Cluster hops were not dirty picked in that the leaf and stem content determined by the inspection of the governmental agency pursuant to said contract, as aforesaid, was less than the 10% tolerance allowed by said contract. Said hops were not any more badly blighted than when defendant inspected and contracted to buy the same, or than when defendant subsequently in-

spected them and instructed plaintiff to continue picking the same. Plaintiff believes and therefore alleges that the actual reason for defendant's refusal to pay the balance due on said purchase of said Cluster hops was the general market condition described above, and that defendant would have persisted in said refusal regardless of anything more plaintiff might have done or offered to do.

### X.

At all times since defendant so declined to accept said Cluster hops, they could not be re-sold for a reasonable price for the reasons that

(a) defendant's said contract of purchase purported to constitute a lien on said hops and a cloud on plaintiff's title thereto,

(b) there was an over production of hops during the 1947 season in that the amount produced was substantially in excess of the market demand, and

(c) it is not the practice of any of the hop buyers doing business in this territory to buy hops which have been rejected by another hop buyer unless the seller will waive any right of action he may have against the buyer who rejected such hops.

Therefore, plaintiff has at all times held said Cluster hops as bailee of the defendant, and so notified the defendant, and said hops are still in said warehouse subject to the disposal of the defendant upon paying the balance of the contract price due to the plaintiff.

## XI.

By reason of the facts stated above defendant became indebted to plaintiff in the sum of \$11,854.08 for said Cluster hops. Of that amount defendant has paid the sum of \$3,000.00 (being the advances mentioned in paragraph V), and there is still due and unpaid the sum of \$8,854.08, with interest thereon at the rate of 6% per annum from October 25, 1947, until paid.

## XII.

On several occasions after said amount of \$8,854.08 became due, plaintiff duly made demand on the defendant for payment thereof but each such demand was refused by defendant on the grounds stated in paragraph IX above, and on no other specific ground.

Plaintiff complains of defendant and for his second cause of action alleges:

## I.

Alleges each and all of the allegations, things and matters contained in paragraphs I, II and III of plaintiff's first cause of action above, and incorporates the same herein by this reference.

## II.

On or about August 19, 1947, defendant inspected plaintiff's said Fuggle hops growing on said farm. Thereupon defendant entered into a contract in writing with plaintiff whereby plaintiff agreed to sell, and defendant agreed to buy, the entire surplus crop of said Fuggle hops "over existing contract"



grown on said farm during 1947. By the reference in said contract to the entire surplus crop of said Fuggle hops "over existing contract" was meant all of said Fuggle hops grown on said farm during 1947 remaining after the portion of said hops which plaintiff had previously agreed to sell to a third party. Said contract with defendant contained the terms and conditions as set out in "Exhibit B" attached hereto and hereby made a part hereof.

### III.

Plaintiff duly performed all of the terms and conditions of said contract for said Fuggle hops on his part to be performed. Plaintiff duly completed the cultivation, harvesting, drying, curing and baling of all said Fuggle hops grown on said farm during 1947 in accordance with said contract. Pursuant to said contract, defendant advanced to plaintiff \$3,500.00 to apply on the purchase of said Fuggle hops.

### IV.

After said Fuggle hops had been picked, dried, cured and baled, as aforesaid, plaintiff with the assent of defendant delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said Fuggle hops and set defendant's portion aside for it. Thereupon, defendant sampled, weighed in and received its portion of said hops.

### V.

Said Fuggle hops so weighed in and received by

defendant consisted of 59 bales and had a total net weight, as determined by defendant, of 10,986 pounds. Defendant accepted the same at the price of 91 cents per pound, and subsequently shipped them out.

## VI.

By reason of the facts hereinabove alleged defendant became indebted to plaintiff in the sum of \$9,997.26 for said Fuggle hops. Of that amount \$3,500.00 has been paid (being the advance mentioned in paragraph III), and there is still due and unpaid the sum of \$6,497.26, with interest thereon at the rate of 6% per annum from October 25, 1947, until paid.

## VII.

On several occasions after the full balance of \$6,497.26 for the sale of said Fuggle hops became due plaintiff duly made demand on defendant for the payment thereof, but each such demand was refused by defendant.

Wherefore, plaintiff demands judgment against the defendant for the sum of \$15,351.38, with interest thereon from October 25, 1947, until paid, and for plaintiff's costs and disbursements in this action.

/s/ ROY F. SHIELDS,

/s/ WILLIAM E. DOUGHERTY,  
MAGUIRE, SHIELDS,

MORRISON & BAILEY,  
Attorneys for Plaintiff.

## EXHIBIT A.

(Copy)

This Agreement, Made this nineteenth day of August, 1947, between Killian Smith of Route 1, Aurora, Oregon, hereinafter called the seller, and Hugo V. Loewi, Inc., of 33 Water Street, New York City, N. Y., hereinafter called the buyer, Witnesseth:

First—In consideration of one dollar (\$1.00) paid to the seller by the buyer, at the time of signing this instrument, the receipt whereof is hereby acknowledged, and of the agreements hereinafter contained on the part of the buyer, the seller agrees to cultivate and complete the cultivation of about 10 acres of land now planted in hops, during the year 1947, consisting of 10 acres planted in cluster hops, and on the following described real estate, to-wit: situate about 2½ miles northwest of Donald on the Aurora-Newberg highway on what is known as the old Novvak farm in Marion County, State of Oregon, and to harvest, cure and bale the hops grown thereon in said year 1947 in a careful and husbandmanlike manner, and the seller does hereby bargain and sell, and upon ten days' notice in writing therefor, agrees to deliver and to cause to be delivered to the buyer, not later than the 31st day of October of said year f.o.b. cars or in warehouse at Salem, Oregon, free from all liens and encumbrances of any kind and nature entire crop estimated at—ten—thousand pounds (10,000 lbs.) of cluster hops grown on said premises, and in bales weighing not less than 185 pounds and not more than 210 pounds each, in

new 24 ounce baling cloth (5 pounds tare per bale to be allowed) ; that such hops shall not be the product of the first year's planting, and not affected by spraying or mold, but shall be of prime quality, in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition. The buyer under and by this contract shall have the preference of selection, both as to quantity and quality over all other persons who may hereafter make contracts in relation to hops produced from said farm, and said buyer, for the purpose of examining and inspecting the same, may, at any time, and until the full performance of this agreement, have free access to the above described premises, or any other premises where said hops may be.

The price to be paid for the hops to be delivered shall be the Grower's market price for the kind and quality of hops delivered containing eight (8%) per cent of leaves and stems and six (6%) per cent, or more, of seeds; the said Grower's market price may be selected by the seller on any day between August 19, 1947, and October 31, 1947, both dates inclusive, and the Seller must notify the Buyer in writing of his selection on the day he selects. If the Seller does not select and notify then the Grower's market price of October 31, 1947 shall constitute the price for such hops, however, the Buyer agrees that the minimum price for the kind and quality of hops described herein and to be delivered under the terms of this contract shall be Eighty-one (81c) cents per pound.

It is further understood and agreed that in the event the leaf and stem content be less than eight (8%) per cent, then the minimum price, or the market price as selected and agreed upon, will be increased one (1c) cent per pound for each one (1%) per cent reduction in leaf and stem content below eight (8%) per cent; and in the event the leaf and stem content exceeds eight (8%) per cent, then the minimum price, or the market price as selected and agreed upon, will be reduced one (1c) cent per pound for each one (1%) per cent increase of leaf and stem content to and including ten (10%) per cent.

The determination of the leaf and stem content, as aforesaid, shall be on the basis of an analysis made by the Oregon State Department of Agriculture, or by an authorized governmental agency.

Second—The buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor by check, draft, or in lawful money of the United States of America, on the delivery thereof and acceptance by the buyer, and within the time and conditions herein provided, the price or prices as aforestated for each pound thereof which shall be delivered to and accepted by the buyer, who is to have the right to inspect the same before acceptance, and to accept any part less than the whole of the hops so bargained for, should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and



tendered for acceptance be less than the amount herein bargained and sold; and upon the said buyer giving said notice to deliver as herein fixed tendering to the seller the full amount of the purchase price thereof in lawful money, after deducting any advances made and interest thereon, the title and ownership and the right to the immediate possession of the said hops shall at once vest and be in the said buyer. In order to enable the seller to produce and harvest said crop and put the same in the condition herein agreed, the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and curing the same and for such purposes only, not to exceed, however, twenty-five (25c) cents for each pound of hops herein bargained and sold and which may be grown on said lands, such advances to bear interest at the rate of no per cent per annum. Said advances to be paid in the following manner:

25 cents per pound or \$2,500.00 on or about  
September 1, 1947;

provided, such sums are actually required for the cultivation, picking, drying and baling of said hops, and that, if before, at, or during the time of picking such hops, they are not in such condition so as to produce the quality of hops called for under the terms of his agreement, then in such event, the buyer shall be discharged from any obligation to make any advances or further advances, and from the obligation to receive the whole or part of said

hops; and that this instrument shall then stand and be in force as a chattel mortgage upon the whole of said hop crop for any advances which shall have been made, or may be made, and interest thereon.

Third—The said parties hereto further agree that as soon as the picking of the said hops is commenced the seller shall insure his hop houses on said premises and the entire crop of hops growing thereon against damage by fire for the full market value thereof and until the delivery under this contract, such insurance to be placed in only good solvent fire insurance companies. The policy thereon shall provide that the loss, if any, shall be paid to the buyer; but if the seller fails to procure such insurance or to pay for the same, the buyer shall have the right to procure such insurance in his own name, or in that of the seller at the buyer's option at any time after commencement of picking. The seller agrees to repay to the buyer at the time of delivery all premiums on such insurance with interest at the rate of 6 per cent per annum.

Fourth—All sums of money to be advanced under the terms of this contract are payable only at the office of the buyer in Salem, Oregon, upon ten days' written request and notice by the seller to the buyer therefor; such money may be forwarded either in cash or by check or draft by mail, or express, at the seller's risk and expense. It is further agreed between the parties hereto that the times when the said moneys shall be advanced, and when the said hops shall be delivered pursuant to

this contract, are of the essence of this contract, and that failure upon the part of the buyer to advance said money at said time, the seller not then being in default, shall give the seller the right to rescind the contract at his option, and the failure upon the part of the seller to deliver the hops within the time and in the condition and of the quality provided for by this contract, the buyer not then being in default, shall give the buyer the right to rescind the contract at his option.

Fifth—The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages.

Sixth—That for and in consideration of the said 25 cents per pound, not exceeding in all the sum of two thousand five hundred and no/100 Dollars, hereinbefore agreed to be advanced by the buyer, and in consideration of the faithful performance of the said contract by the seller and for the payment of said liquidated damages, the seller does hereby bargain, sell, transfer, set over and mortgage unto the said buyer, the entire crop of hops growing and raised upon the premises above de-

scribed in the year 1947, to secure unto the said buyer the repayment of said advances and interest and the said liquidated damages upon the demand of said buyer, or in case the said seller shall part with the possession of any of said hops, or remove or undertake to remove any thereof, out of said Marion County, or suffer the same to be attached or levied upon by any creditor of said seller, or should bankruptcy proceedings be instituted by, or against, the seller, then the said buyer may enter upon any premises where the said hops may be found and take immediate possession thereof, and upon giving ten days' written notice to the seller of his intention to do so, may sell the same at public or private sale, and out of the proceeds thereof retain sufficient to repay said advances and the said liquidated damages and the costs of the said sale, and the balance, if any there be, pay over to the said seller or his representatives.

Seventh—This contract is not transferable by the said seller, and the said seller shall not sell, assign, or transfer his interest in this contract, or any part thereof, without the written consent of the said buyer, and that the said seller shall not at any time lease or sub-let the above described land, or any part thereof, or sell the same or any part thereof, and the said seller shall not at any time allow the said lands and premises, or any part thereof, to become encumbered by any mortgage, judgment, or other lien whatsoever without the written consent of the said buyer, and that the said seller shall

not in any way or manner jeopardize or interfere with the delivery of the said hops, or any part thereof under this contract, and that in case the said seller shall violate any of the provisions and conditions in this contract on his part to be performed, or should bankruptcy proceedings be instituted by, or against, the seller, then and in that case the said buyer shall have the right at his option to rescind this contract, and immediately upon such rescission, he, the said buyer shall have the right of action against the said seller for the recovery of any and all damages resulting on account thereof to the said buyer.

Eighth—It is agreed that all hops sold hereunder shall be within the grower's salable allotment in accordance with the provisions of the Federal Hop Marketing Agreement and Order, and if the quantity contracted hereunder shall exceed such allotment, this contract shall cover only the grower's salable allotment. The hops covered hereby are entitled to priority over any and all other hops produced from said property as regards both allotments and handling certificates. If said hops are not allocated and handling certificates therefor are not available by October 15th prior to such final delivery date, then the time for taking delivery by the buyer shall be, and hereby is, extended for a reasonable time after such allotments are made and certification is available.



In Witness Whereof, the said parties hereto have set their hands the day and year first above written.

.....,

Seller.

.....,

Buyer.

State of Oregon,  
County of Marion—ss.

On this 20th day of August, 1947, personally came before me, a Notary Public in and for said County, the within named Kilian Smith to me known to be the identical person described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein named.

Witness my hand and notarial seal this 20 day of August, 1947.

.....,

Notary Public.

My Commission expires:

## EXHIBIT B

(Copy)

This Agreement, Made this 19th day of August, 1947, between Killian Smith of Route 1, Aurora, Oregon, hereinafter called the Seller, and Hugo V. Loewi, Inc. of 33 Water Street, New York City, N.Y., hereinafter called the Buyer, Witnesseth:

First—In consideration of One Dollar (\$1.00) paid to the seller by the buyer, at the time of signing this instrument, receipt whereof is hereby acknowledged, and of the agreements hereinafter contained on the part of the buyer, the seller agrees to cultivate and complete the cultivation of about 24 acres of land now planted in hops, during the year 1947, consisting of 24 acres planted in fuggle hops, .. acres planted in ..... hops, and on the following described real estate, to-wit: situate about 2½ miles Northwest of Donald on the Aurora-Newberg highway on what is known as the old Novvak farm in Marion County, State of Oregon, and to harvest, cure and bale the hops grown thereon in said year 1947 in a careful and husbandmanlike manner, and the seller does hereby bargain and sell, and upon ten days' notice in writing therefor, agrees to deliver and to cause to be delivered to the buyer, not later than the 31st day of October of said year f.o.b. cars or in warehouse at Salem, Oregon, free from all liens and encumbrances of any kind and nature entire crop surplus hops over existing contract estimated at fourteen

thousand pounds (14,000 lbs.) of fuggle hops and  
..... thousand pounds (..... lbs.) of  
..... hops grown on said premises, and  
in bales weighing not less than 185 pounds and  
not more than 210 pounds each, in new 24 ounce  
baling cloth (5 pounds tare per bale to be allowed);  
that such hops shall not be the product of the first  
year's planting, and not affected by spraying or  
mold, but shall be of prime quality, in sound con-  
dition, good color, fully matured, cleanly picked,  
free from damage by vermin, properly dried, cured  
and baled, and in good order and condition. The  
buyer under and by this contract shall have the  
preference of selection, both as to quantity and  
quality over all other persons who may hereafter  
make contracts in relation to hops produced from  
said farm, and said buyer, for the purpose of  
examining and inspecting the same, may, at any  
time, and until the full performance of this agree-  
ment, have free access to the above described  
premises, or any other premises where said hops  
may be.

The price to be paid for the hops to be delivered  
shall be the Grower's market price for the kind and  
quality of hops delivered containing eight (8%)  
percent of leaves and stems and six (6%) percent,  
or more, of seeds; the said Grower's market price  
may be selected by the Seller on any day between  
August 19, 1947 and October 31, 1947, both dates  
inclusive, and the Seller must notify the Buyer in  
writing of his selection on the day he selects. If

the Seller does not select and notify then the Growers' market price of October 31, 1947 shall constitute the price for such hops, however, the Buyer agrees that the minimum price for the kind and quality of hops described herein and to be delivered under the terms of this contract shall be Eighty-one (81c) cents per pound.

It is further understood and agreed that in the event the leaf and stem content be less than eight (8%) percent, then the minimum price, or the market price as selected and agreed upon, will be increased one (1c) per pound for each one (1%) percent reduction in leaf and stem content below eight (8%) percent; and in the event the leaf and stem content exceeds eight (8%) percent, then the minimum price, or the market price as selected and agreed upon, will be reduced one (1c) cent per pound for each one (1%) percent increase of leaf and stem content to and including ten (10%) percent.

The determination of the leaf and stem content, as aforesaid, shall be on the basis of an analysis made by the Oregon State Department of Agriculture, or by an authorized governmental agency.

The price to be paid by the buyer for the hops to be delivered hereunder shall be the Growers' ceiling price or prices as established by the Office of Price Administration, or other Governmental Agency, for the kind and quality of hops delivered hereunder. In the event that no such ceiling price is in effect, then the price to be paid for the hops

to be delivered shall be the Grower's market price for the kind and quality of hops delivered; the said Grower's market price may be selected by the Seller on any day between . . . . ., 19.., and . . . . ., 19.., both dates inclusive, and the Seller must notify the Buyer in writing of his selection on the day he selects. If the Seller does not select and notify then the Grower's market price of . . . . ., 19.. shall constitute the price for such hops, however, the Buyer agrees that the minimum price for the kind and quality of hops described herein and to be delivered under the terms of this contract shall be . . . . . (....) cents per pound.

Second—The buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor by check, draft, or in lawful money of the United States of America, on the delivery thereof and acceptance by the buyer, and within the time and conditions herein provided, the price or prices as aforestated for each pound thereof which shall be delivered to and accepted by the buyer, who is to have the right to inspect the same before acceptance, and to accept any part less than the whole of the hops so bargained for, should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and tendered for acceptance be less than the amount herein bargained and sold; and upon the said buyer giving said notice to deliver as herein



fixed tendering to the seller the full amount of the purchase price thereof in lawful money, after deducting any advances made and interest thereon, the title and ownership and the right to the immediate possession of the said hops shall at once vest and be in the said buyer. In order to enable the seller to produce and harvest said crop and put the same in the condition herein agreed, the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and curing the same and for such purposes only, not to exceed, however, twenty-five (25c) cents for each pound of hops herein bargained and sold and which may be grown on said lands, such advances to bear interest at the rate of no percent per annum. Said advances to be paid in the following manner: .. cents per pound or \$. . . . .  
... on or about . . . . . 19..; .. cents per pound or \$. . . . . on or about . . . . . 19..; .. cents per pound or \$. . . . . on or about . . . . . 19..; 25 cents per pound or \$3,500.00 on or about August 20, 1947; .. cents per pound or \$. . . . . on or about . . . . . 19..; provided, such sums are actually required for the cultivation, picking, drying and baling of said hops, and that, if before, at, or during the time of picking such hops, they are not in such condition so as to produce the quality of hops called for under the terms of his agreement, then in such event, the buyer shall be discharged from any obligation to make any advances or

further advances, and from the obligation to receive the whole or part of said hops; and that this instrument shall then stand and be in force as a chattel mortgage upon the whole of said hop crop for any advances which shall have been made, or may be made, and interest thereon.

Third—The said parties hereto further agree that as soon as the picking of the said hops is commenced the seller shall insure his hop houses on said premises and the entire crop of hops growing thereon against damage by fire for the full market value thereof and until the delivery under this contract, such insurance to be placed in only good solvent fire insurance companies. The policy thereon shall provide that the loss, if any, shall be paid to the buyer; but if the seller fails to procure such insurance or to pay for the same, the buyer shall have the right to procure such insurance in his own name, or in that of the seller at the buyer's option at any time after commencement of picking. The seller agrees to repay to the buyer at the time of delivery all premiums on such insurance with interest at the rate of 6 percent per annum.

Fourth—All sums of money to be advanced under the terms of this contract are payable only at the office of the buyer in Salem, Oregon, upon ten days' written request and notice by the seller to the buyer therefor; such money may be forwarded either in cash or by check or draft by mail, or express, at the seller's risk and expense. It is further agreed

between the parties hereto that the times when the said moneys shall be advanced, and when the said hops shall be delivered pursuant to this contract, are of the essence of this contract, and that failure upon the part of the buyer to advance said money at said time, the seller not then being in default, shall give the seller the right to rescind the contract at his option, and the failure upon the part of the seller to deliver the hops within the time and in the condition and of the quality provided for by this contract, the buyer not then being in default, shall give the buyer the right to rescind the contract at his option.

Fifth—The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages.

Sixth—That for and in consideration of the said 25 cents per pound, not exceeding in all the sum of Three thousand five hundred and no/100 Dollars, hereinbefore agreed to be advanced by the buyer, and in consideration of the faithful performance of the said contract by the seller and for the pay-

ment of said liquidated damages, the seller does hereby bargain, sell, transfer, set over and mortgage unto the said buyer, the entire crop of hops growing and raised upon the premises above described in the year 1947, to secure unto the said buyer the repayment of said advances and interest and the said liquidated damages upon the demand of said buyer, or in case the said seller shall part with the possession of any of said hops, or remove or undertake to remove any thereof, out of said Marion County, or suffer the same to be attached or levied upon by any creditor of said seller, or should bankruptcy proceedings be instituted by, or against, the seller, then the said buyer may enter upon any premises where the said hops may be found and take immediate possession thereof, and upon giving ten days' written notice to the seller of his intention to do so, may sell the same at public or private sale, and out of the proceeds thereof retain sufficient to repay said advances and the said liquidated damages and the costs of the said sale, and the balance, if any there be, pay over to the said seller or his representatives.

Seventh—This contract is not transferable by the said seller, and the said seller shall not sell, assign, or transfer his interest in this contract, or any part thereof, without the written consent of the said buyer, and that the said seller shall not at any time lease or sub-let the above described land, or any part thereof, or sell the same or any part thereof, and the said seller shall not at any time allow the said

lands and premises, or any part thereof, to become encumbered by any mortgage, judgment, or other lien whatsoever, without the written consent of the said buyer, and that the said seller shall not in any way or manner jeopardize or interfere with the delivery of the said hops, or any part thereof under this contract, and that in case the said seller shall violate any of the provisions and conditions in this contract on his part to be performed, or should bankruptcy proceedings be instituted by, or against, the seller, then and in that case the said buyer shall have the right at his option to rescind this contract, and immediately upon such rescission, he, the said buyer shall have the right of action against the said seller for the recovery of any and all damages resulting on account thereof to the said buyer.

Eighth—It is agreed that all hops sold hereunder shall be within the grower's saleable allotment in accordance with the provisions of the Federal Hop Marketing Agreement and Order, and if the quantity contracted hereunder shall exceed such allotment, this contract shall cover only the grower's salable allotment. The hops covered hereby are entitled to priority over any and all other hops produced from said property as regards both allotments and handling certificates. If said hops are not allocated and handling certificates therefor are not available by October 15th prior to such final delivery date, then the time for taking delivery by the buyer shall be, and hereby is, extended for a reasonable



time after such allotments are made and certification is available.

In Witness Whereof, the said parties hereto have set their hands the day and year first above written.

.....

Seller

.....

Buyer

State of Oregon,  
County of Multnomah—ss.

I, Kilian W. Smith, being first duly sworn, depose and say that I am the Plaintiff in the above entitled action; and that the foregoing Complaint is true as I verily believe.

/s/ KILIAN W. SMITH.

Subscribed and sworn to before me this 6th day of March, 1948.

[Seal]     /s/ WILLIAM E. DOUGHERTY,  
Notary Public for the State of Oregon.

My Commission Expires Oct. 15, 1951.

[Endorsed]:    Filed March 16, 1948.

In the Circuit Court of the State of Oregon  
For the County of Marion

No. 34864

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

NOTICE OF EXTENSION TO FILE PETITION  
AND BOND FOR REMOVAL OF CAUSE

To: Maguire, Shields & Morrison, attorneys for  
plaintiff.

Please take notice that Hugo V. Loewi, Inc., a corporation, the defendant in the above entitled cause, will on the 26th day of March, 1948, at 9:30 o'clock in the forenoon of that day, file in the Circuit Court of the State of Oregon for the County of Marion in said State, and in the Clerk's office thereof, in which said action is now pending, its petition and bond for removal of the said cause from the said Court to the District Court of the United States for the District of Oregon, and that on the 26th day of March, 1948, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, said petition and bond will be called up for hearing and disposition before the above Court in which this action is pending, at

which time and place you may be present if you so elect.

Copies of said petition and bond are herewith served upon you.

Dated this 25th day of March, 1948.

KERR & HILL,

Attorneys for

Defendant Petitioner.

[Endorsed]: Filed March 26, 1948.

---

In the Circuit Court of the State of Oregon  
For the County of Marion

No. 34864

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

PETITION FOR REMOVAL OF CAUSE TO  
THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF ORE-  
GON

To The Circuit Court of the State of Oregon in and  
for the County of Marion:

The petition of Hugo V. Loewi, Inc., a corpora-  
tion, defendant in the above entitled action, respect-  
fully shows:

I.

The above entitled action has been brought in this County and is now pending therein.

II.

Said action is of a civil nature at law, of which the District Courts of the United States have original jurisdiction, in that the suit is one to recover damages alleged to have been sustained by the plaintiff as the result of an alleged breach of contract on the part of the defendant.

III.

That petitioner appears herein specially and solely for the purpose of removing said cause to the United States District Court in and for the District of Oregon, upon the ground and for the reason that the controversy in said action is between citizens of different states, in that your petitioner, Hugo V. Loewi, Inc. was at the time of commencement of this action and still is a corporation created and existing under and by virtue of the laws of the State of New York, and was then and still is a resident and citizen of said State of New York and not a resident or citizen of the State of Oregon, whereas the said plaintiff was at the time of commencement of this action and still is, a citizen of the State of Oregon, residing in Marion County in said State.

IV.

That the amount in controversy at the time of

the commencement of this action and at the present time exceeds the sum of \$3,000.00, exclusive of interest and costs.

## V.

That the time for your petitioner, as defendant in this action, to move, answer or plead to the complaint in said action has not expired and will not so expire until the 26th day of March, 1948.

## VI.

Petitioner herewith presents a good and sufficient bond, as provided by statute, that it will enter in such District Court of the United States for the District of Oregon within thirty days from the filing of this petition, a certified copy of the record in this action, and for the payment of all costs which may be awarded by said Court if the said District Court shall hold that this action was wrongfully or improperly removed thereto.

Wherefore, petitioner prays that this Court proceed no further herein, except to make an order of removal and to accept the said bond, and to cause the record herein to be removed into the District Court of the United States for the District of Oregon.

HUGO V. LOEWI, INC.,  
a corporation.

By /s/ ROBERT M. KERR,  
Its Attorney.



State of Oregon,  
County of Multnomah—ss.

I, Robert M. Kerr, being first duly sworn, depose and say:

That I am one of the attorneys for the defendant in the above entitled cause, the petitioner herein; that I have read the foregoing petition and that I believe it to be true; that said petitioner is absent from and is a non-resident of the State of Oregon and County of Marion in which said suit is brought, and that I make this affidavit for the reason that petitioner is absent from and is a non-resident of the said County of Marion in which said action is brought.

/s/ ROBERT M. KERR.

Subscribed and sworn to before me this 25th day of March, 1948.

[Seal]      /s/ ALBERT L. NELSON,  
Notary Public for Oregon.

My commission expires 12-30-50.

In the Circuit Court of the State of Oregon  
For the County of Marion

No. 34864

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

ORDER OF REMOVAL

This cause coming on for hearing upon petition of Hugo V. Loewi, Inc., a corporation, the defendant in the above entitled cause, for an order removing this cause to the District Court of the United States for the District of Oregon, and it appearing to this Court that the defendant has filed its petition for such removal in due form and within the required time and that the defendant has filed its bond duly conditioned as provided by law, and it being shown to the Court that the notice required by law of the filing of said bond and petition, had prior to the filing thereof been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the statutes, and it appearing to this Court that this is a proper cause for removal to said District Court of the United States, this Court does now hereby accept and approve said bond and said peti-

tion and does order this cause to be removed to the District Court of the United States for the District of Oregon, pursuant to Sections 28 and 29 of the Judicial Code of the United States, and that all other proceedings of this Court be stayed, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Dated this 26th day of March, 1948.

/s/ E. M. PAGE,

Judge of the Circuit Court.

[Endorsed]: Filed March 26, 1948.

State of Oregon,  
County of Marion—ss.

I, H. A. Judd, County Clerk of the above named County and State and ex-officio Clerk of the Circuit Court of the County of Marion, State of Oregon, do hereby certify that the foregoing copy of Complaint, Summons, Notice of Intention to File Petition and Bond for Removal; Petition for Removal, Bond for Removal and Order of Removal in re: Kilian W. Smith vs. Hugo V. Loewi, Inc., a corporation, No. 34864 has been by me compared with the original and that it is a correct transcript therefrom and of the whole of such original record or file as the same appears of record or on file in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, this 5th day of April, A.D. 1948.

H. A. JUDD,

County Clerk.

[Seal] By /s/ R. G. HOWARD,

Deputy.

[Endorsed]: Filed April 23, 1948.

---

In the District Court of the United States  
For the District of Oregon  
Civil Action, File No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

MOTION TO DISMISS, TO STRIKE AND  
FOR MORE DEFINITE STATEMENT

The defendant moves the Court as follows:

1. To dismiss the first cause of action set forth in the complaint on file herein because the same fails to state a claim against the defendant upon which relief can be granted.

2. In the event the said first action is not dismissed, that the Court order stricken from the com-

plaint, as redundant, immaterial and impertinent, each of the following:

(a) In paragraph IV, page 2, lines 2 and 3, the words “defendant inspected plaintiff’s said Cluster hops growing on said farm”.

(b) In paragraph V, page 2, lines 12, 13 and 14, the words “except to the extent that such performance was waived by defendant, or prevented by its acts or conduct as herein alleged”.

(c) All of paragraph VI on page 2.

(d) All of paragraph IX on page 3, except only the words, in lines 23 to 25, “on or about October 16, 1947, defendant refused to pay for plaintiff’s said Cluster hops on the stated grounds that they were dirty picked and badly blighted”.

(e) In the event the matter specified in (d) is not ordered stricken, that the Court order stricken from paragraph IX on page 3 the words, in lines 29 to 32, “Said hops were not any more badly blighted than when defendant inspected and contracted to buy the same, or than when defendant subsequently inspected them and instructed plaintiff to continue picking the same”.

3. In the event the matter specified in (b) applicable to paragraph V on page 2 is not ordered stricken, then the defendant moves that the plaintiff be ordered to make a more definite statement of the matters stated in said paragraph V, in the following respects:



(a) The extent to which the plaintiff did not duly perform the terms and conditions of the contract on his part to be performed.

(b) In what manner such performance was waived by the defendant.

(c) In what manner such performance was prevented by the defendant.

(d) The alleged acts or conduct of the defendant in said paragraph V referred to.

KERR & HILL,  
/s/ ROBERT M. KERR,  
/s/ STUART W. HILL,  
Attorneys for Defendant.

#### NOTICE OF MOTION

To: Roy F. Shields, William E. Dougherty, Maguire, Shields, Morrison & Bailey, Attorneys for Plaintiff:

Please take notice that the undersigned will bring the foregoing motion on for hearing before this Court on the 10th day of May, 1948, at 10 o'clock a.m., or as soon thereafter as counsel may be heard.

/s/ ROBERT M. KERR,  
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 28, 1948.

[Title of District Court and Cause.]

ORDER RESERVING DECISION  
ON MOTION

Plaintiff appearing by Mr. R. B. Kester and Mr. William E. Dougherty, of counsel, and the defendant by Mr. R. M. Kerr, of counsel. Whereupon, this cause comes on to be heard upon the motion of the defendant for an order dismissing the complaint; to strike certain portions of the complaint, and for a more definite statement, and the Court having heard the arguments of counsel, reserves its decision.

May 10, 1948.

---

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Now comes plaintiff and for reply to defendant's counterclaim denies each and every allegation, thing and matter contained therein and the whole thereof except insofar as admitted in plaintiff's complaint.

ROY F. SHIELDS,

/s/ WILLIAM E. DOUGHERTY,  
MAGUIRE, SHIELDS,  
MORRISON & BAILEY,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

## AMENDED ANSWER

For answer to the complaint of the plaintiff in the above entitled cause, the defendant says:

For answer to the first cause of action therein:

### First Defense

The complaint in its first cause of action fails to state a claim against defendant upon which relief can be granted.

### Second Defense

1. Defendant admits paragraphs I and II of the first cause of action.

2. Answering paragraph III, defendant admits the allegations therein except that defendant denies that defendant has been or is transacting in the State of Oregon the business of selling hops.

3. Answering paragraph IV, defendant admits that on or about August 19, 1947 defendant entered into a contract in writing, a copy of which contract is attached to the complaint as Exhibit "A"; defendant denies each and every other allegation in said paragraph IV.

4. Defendant denies all the allegations of paragraph V except only that defendant admits that pursuant to the aforesaid contract defendant did advance to plaintiff \$3,000.00.

5. Defendant denies all the allegations of paragraph VI.

6. Defendant denies all the allegations of paragraph VII, except that the defendant admits that the said hops were placed in storage by the plaintiff, for his own account, and that, with the defendant's assent, they were there made available to the defendant for inspection. The defendant admits that it sampled and weighed the hops.

7. Defendant admits the allegations of paragraph VIII except that defendant denies that the hops therein referred to were inspected by the United States Department of Agriculture, and denies that the sales price for said hops was 85 cents per pound or that the contract sales price therefor was 84 cents per pound, or any other sum.

8. Defendant denies all of paragraph IX except only that defendant admits that on or about October 16, 1947 defendant did reject and refuse to pay for the hops therein referred to.

9. Defendant denies all of paragraph X except only that defendant admits that the contract therein referred to purported to constitute a lien on the hops.

10. Defendant denies all of paragraph XI except only that defendant admits that defendant has paid to plaintiff \$3,000.00 as a loan and advance pursuant to the aforesaid contract.

11. Defendant denies paragraph XII except

only that defendant admits that plaintiff made demand upon defendant for a sum of money which demand was refused by defendant.

12. Defendant denies each and every allegation of the first cause of action not herein admitted or specifically denied.

### Third Defense

Plaintiff failed to perform the provisions of the contract referred to in plaintiff's complaint on plaintiff's part to be performed, the same being conditions precedent on plaintiff's part to be performed, in that plaintiff failed to harvest, cure and bale in a careful and husbandlike manner the hops grown in the year 1947 on the acreage described in said contract, and that the 1947 crop hops produced by plaintiff on said premises and tendered to defendant under said contract were affected by mold, were not of prime quality, were not in sound condition, were not of good color, were not fully matured, were not cleanly picked, and were not in good order and condition, and that the plaintiff wholly failed to deliver or tender to defendant or to appropriate unconditionally to the said contract, with or without the defendant's assent, hops grown in the year 1947 of the type, quality, grade and condition required by the said contract.

### Counterclaim

Plaintiff owes to defendant \$3,000.00 for money lent and advanced to plaintiff by defendant, on or about August 19, 1947, as an advance to defray



necessary production costs under the contract referred to in plaintiff's first cause of action herein. Defendant thereafter and on or about October 16, 1947 notified plaintiff that the hops tendered to defendant by plaintiff under said contract were not of the grade, quality or condition called for by said contract and therefore were not accepted by the defendant, and defendant thereupon demanded of plaintiff the repayment of said \$3,000.00, but plaintiff has wholly failed and refused to pay to defendant any part of said advance and loan and no part thereof has been repaid to defendant.

For answer to the second cause of action in plaintiff's complaint:

### First Defense

1. Defendant admits paragraph I except that defendant denies that defendant has been or is transacting in the State of Oregon the business of selling hops.

2. Defendant admits paragraphs II, III, IV, and V.

3. Defendant denies the allegations of paragraph VI except only that defendant admits that the purchase price for the hops therein referred to was \$9,997.26, and that defendant paid to plaintiff, as an advance, \$3,500.00 on that purchase price.

4. Answering paragraph VII, defendant denies the same except that defendant admits that on several occasions the plaintiff demanded of defendant payment of \$6,497.26.

## Second Defense.

At the time of delivery to defendant and acceptance by defendant of the hops referred to in plaintiff's second cause of action herein, and on or about October 25, 1947, defendant did tender to plaintiff \$3,497.26 in full payment of the agreed and contract price for said hops less the advance of \$3,500.00 previously paid by defendant to plaintiff on said purchase price, and less, also, an advance of \$3,000.00 paid to plaintiff by defendant under the contract referred to in plaintiff's first cause of action herein, and defendant at all times since that date has made and does now make a continuing tender of said sum of \$3,497.26, the same being the full and only sum owing or due from defendant to plaintiff. Plaintiff refused and rejected and all times has continued to refuse and reject said tender of payment.

Wherefore defendant prays judgment that the complaint of plaintiff be dismissed as to its first cause of action, and against the plaintiff in the sum of \$3,000.00 and interest thereon from August 19, 1947, and for defendant's costs.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Defendant.

United States of America,  
District of Oregon—ss.

I, Stuart W. Hill, being first duly sworn, depose

and say: That I am one of the attorneys for the defendant in the above-entitled cause; that I have read the foregoing Amended Answer and believe it to be true; that said defendant is absent from and a non-resident of the District of Oregon in which said cause is pending, and that I make this affidavit for that reason.

/s/ STUART W. HILL.

Subscribed and sworn to before me this 28th day of January, 1949.

[Seal]      /s/ R. M. KERR,  
Notary Public for Oregon.

My Commission Expires 2/5/51.

State of Oregon,  
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Amended Answer and have carefully compared the same with the original thereof; and that it is a correct copy therefrom and of the whole thereof.

That the said Amended Answer in my opinion is well founded in law.

Dated Jan. 28, 1949.

/s/ STUART W. HILL,  
Of Attorneys for Defendant.

[Endorsed]: Filed January 28, 1949.

In the District Court of the United States  
For the District of Oregon

Civil No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

Civil No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

### MEMORANDUM OF DECISION

The ground for decision in the Nusom case, filed today, applies to these cases. In the Geschwill case the contract was made after the hops were known to be mildewed. In the Smith case the grower asked for directions, and was encouraged by the buyer to go further into buyer's debt, after both parties knew the hops were mildewed.

Under these circumstances, the buyer cannot now reject the hops on the ground that the hops do not comply with the contract. This would be abhorrent to equity.

Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed June 15, 1949.

In the United States District Court  
For the District of Oregon

Civil Action No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This action was tried at Portland, Oregon, before the undersigned Judge of the above-entitled Court. Plaintiff appeared in person and by Randall B. Kester and William E. Dougherty of his attorneys, and defendant appeared by Robert M. Kerr and Stuart W. Hill, its attorneys. Both parties waived jury trial, and the issues were tried by the Court.

It appearing that this action involved common questions of law and fact with the actions of Fred Geschwill, plaintiff, vs. Hugo V. Loewi, Inc., defendant, Civil Action No. 4082, and O. L. Wellman, plaintiff, vs. John I. Haas, Inc., defendant, Civil Action No. 4158, the parties consented and the Court ordered that said three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and heard and should be considered in each of the actions to the extent



that such evidence was pertinent, material and relevant.

The joint trial of the three actions began on January 25, 1949 and concluded on February 5, 1949. All parties to said actions offered evidence. The Court heard arguments of counsel for the respective parties, and the Court considered memorandum briefs on the facts and the law submitted by counsel for the respective parties.

The Court, being fully advised, having considered the evidence, arguments and briefs, and having handed down his memorandum of decision, now hereby makes the following

### Findings of Fact

1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of New York.

2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00; and this Court has jurisdiction of the subject-matter, the parties and the cause of action.

3. On or about August 19, 1947 plaintiff as seller and defendant as buyer entered into the written cluster hop agreement received in evidence herein. By said agreement plaintiff contracted to sell and defendant contracted to buy the entire crop of

cluster hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon. Pursuant to said contract plaintiff cultivated and completed the cultivation of said premises and duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner.

4. As a part of the same transaction plaintiff and defendant entered into another contract whereby plaintiff contracted to sell and defendant contracted to buy certain fuggle hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon. Plaintiff duly performed all the terms and conditions on his part to be performed under said contract, and defendant received and accepted said fuggle hops, which consisted of 59 bales weighing 10,986 pounds net, at the price of 91 cents a pound. Against the total price of \$9,997.26 was applied the advance payment of \$3,500.00 made pursuant to said fuggle contract. The remaining balance was \$6,497.26. On October 25, 1947 defendant tendered plaintiff its check in the amount of \$3,497.26 bearing a notation that it was "for Balance on contract delivery 59 bales fuggles". In arriving at said amount defendant deducted the cluster contract advance hereinafter referred to. Plaintiff refused to accept the check because of the stated condition. Defendant did not at any time pay or offer to pay plaintiff without such condition said balance of \$6,497.26 due under said fuggle contract, or said sum of \$3,497.26, or any other sum, and said balance remains due and unpaid.

5. In 1947 there was, and defendant knew that there was, widespread mildew in cluster hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop contract shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. Before entering into said cluster hop agreement defendant inspected said cluster hop crop and defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled. Such mildew in said hops did not become more prevalent or pronounced after said agreement was entered into.

6. By said cluster hop agreement defendant contracted to make an advance payment to plaintiff of \$2,500.00 in order to enable plaintiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. The agreement provided that defendant would have a prior lien upon said hop crop for any such advance payment, in accordance with the chattel mortgage provisions of said agreement.

7. Said cluster hop agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's

said crop of cluster hops, and that said crop when picked and baled would in normal course show such mildew. On or about August 26, 1947 defendant again inspected said hop crop during picking and before making the advance, and thereupon defendant elected to and did make the advance payment in the sum of \$3,000.00, a larger amount than called for by the contract. And defect which said hop crop may have had by reason of blight or mildew was apparent to defendant at the time of said inspection. Defendant at that time instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance upon defendant's said instruction and advance payment. The mildew in said crop did not thereafter become more pronounced or prevalent.

8. Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state and delivered the same in warehouse at the place and within the time agreed upon in said contract. On or about September 15, 1947, after said cluster hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant, delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said cluster hops and set same aside for defendant. Thereafter, defendant inspected, sampled, marked and weighed said hops at that warehouse. The bales of hops constituting said crop were identified, segregated and appropriated to the contract. Plaintiff duly performed all of the terms

and conditions of the agreement between the parties on his part to be performed.

9. Said cluster hops so weighed by defendant consisted of 73 bales, and had a total net weight, as determined by defendant, of 14,103 pounds. Said hops contained nine per cent. leaves and stems and six per cent. or more of seeds, as determined by an authorized governmental agency in accordance with said agreement.

10. Said agreement provided that the price to be paid for the hops to be delivered would be the grower's market price for the kind and quality of hops delivered containing eight per cent. of leaves and stems and six per cent. or more of seeds, and that in the event the leaf and stem content exceeded eight per cent. then the market price would be reduced one cent per pound for each one per cent. increase of leaf and stem content to and including ten per cent. Pursuant to said contract, on or about September 18, 1947, plaintiff selected as the sale price for said cluster hops said grower's market price at that time which was 85 cents a pound, and duly notified defendant in writing thereof. Since the leaf and stem content was nine per cent., the contract price for said cluster hops was 84 cents a pound. The total contract price of said cluster hops was \$11,846.52.

11. Upon delivery as aforesaid plaintiff duly tendered said entire crop of cluster hops to defendant in warehouse at the place specified in said



agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof except said partial advance payment. Said hops, as defendant knew, continued to be and are still held by the warehouseman. Defendant at all times has known that it could obtain said hops upon payment of the balance of said purchase price.

12. On or about October 16, 1947 defendant rejected and refused to pay for said cluster hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay for said hop crop on the particular ground that said cluster hops were blighted and dirty picked, and on no other specific ground. By the term "blighted" it was meant that the hops showed some mildew effect as stated above, and by the term "dirty picked" it was meant that the hops contained over the average eight per cent. leaf and stem content. At the trial defendant advanced the same specific objections to the hops. Upon the facts neither claimed defect was material. Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same, or when defendant elected to make the advance payment, or when defendant instructed plaintiff to continue picking. The leaf and stem content was within the tolerance allowed by the terms of said agreement. Said 1947 crop hops pro-

duced by plaintiff on said premises and tendered to the defendant under said contract were merchantable.

13. Plaintiff delivered the identical cluster hop crop which defendant contracted to buy. Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid. Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.

14. On plaintiff's first cause of action, relating to the cluster hops, there became due and owing from defendant to plaintiff on October 31, 1947 the sum of \$8,846.52, being the contract price of \$11,846.52 less the advance of \$3,000.00. No part of said balance has been paid.

15. On plaintiff's second cause of action, relating to the fuggle hops, there became due and owing from defendant to plaintiff on October 31, 1947 the sum of \$6,497.26, being the contract price of \$9,997.26 less the advance of \$3,500.00. No part of said balance has been paid.

Upon the foregoing findings of fact the Court has determined and does hereby make the following

Conclusions of Law

1. Plaintiff substantially performed all of the terms and conditions of each of the agreements between the parties, with respect both to the fuggle and the cluster hops, on his part to be performed.

2. The property in said fuggle and said cluster hops passed to defendant.

3. Defendant wrongfully refused to and did not perform its obligation under each of said agreements.

4. On both causes of action the measure of plaintiff's recovery upon the facts here is, under Oregon law, the amount due under each said contract after deducting the respective advance payment.

5. Each advance payment having been credited against the respective amount due from defendant, defendant should take nothing under either of its counterclaims.

6. Plaintiff should have judgment against defendant for \$8,846.52 on his first cause of action, and for \$6,497.26 on his second cause of action, together with interest at the rate of six per cent. per annum from October 31, 1947 until the same

be paid in full, and with costs and disbursements;  
and judgment will be entered accordingly.

Dated this 22nd day of September, 1949.

/s/ CLAUDE McCOLLOCH,  
Judge.

Proposed form submitted by

/s/ WILLIAM E. DOUGHERTY,  
/s/ RANDALL B. KESTER,  
Of Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 22, 1949.

---

In the United States District Court  
For the District of Oregon  
Civil Action No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

### JUDGMENT

The Court having found the facts in this cause specially, stated separately its conclusions of law thereon, and directed the entry of this, the appropriate judgment, it is therefore

Considered, Ordered and Adjudged that plaintiff have and recover from the defendant the sum of \$8,846.52 and also the sum of \$6,497.26, with interest on each of said sums at the rate of six per cent per annum from October 31, 1947, and plaintiff's costs herein taxed at \$205.01.

Dated this 30th day of September, 1949.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed September 30, 1949.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Hugo V. Loewi, Inc., a corporation, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of September, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant, Hugo V. Loewi, Inc., a corporation.

[Endorsed]: Filed October 10, 1949.



[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Know All Men By These Presents, that we, Hugo V. Loewi, Inc., a New York corporation, as principal, and National Surety Corporation, a New York corporation, as surety, are held and firmly bound unto Kilian W. Smith in the full and just sum of \$20,000.00, to be paid to the said Kilian W. Smith or his certain attorney, executor, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of October, 1949.

Whereas, lately at a session of the District Court of the United States for the District of Oregon in a suit pending in said Court, between Kilian W. Smith, as plaintiff, and Hugo V. Loewi, Inc., a New York corporation, as defendant, a judgment was rendered against the said defendant and the said defendant, Hugo V. Loewi, Inc., a New York corporation, having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, California.

Now, the condition of the above obligation is such that if the said defendant, Hugo V. Loewi, Inc., a New York corporation, shall prosecute its appeal to effect, and satisfy the judgment in full, together

with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award if said Hugo V. Loewi, Inc., a New York corporation, fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

HUGO V. LOEWI, INC.,  
a New York corporation.

[Seal] By /s/ ROBERT M. KERR,  
Its Attorney in Fact,  
Principal.

NATIONAL SURETY  
CORPORATION,  
a New York corporation.

[Seal] By /s/ W. B. GILHAM,  
Its Attorney in Fact,  
Surety.

Countersigned

PHIL GROSSMAYER CO.,  
Resident Agents.

By /s/ W. B. GILHAM.

Form of bond and sufficiency of surety approved,  
this 10th day of October, 1949.

/s/ CLAUDE McCOLLOCH,  
U.S. District Judge.

## Power of Attorney

Know All Men By These Presents, that Hugo V. Loewi, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, has made, constituted, and appointed, and by these presents does make, constitute, and appoint Robert M. Kerr, of Portland, in the State of Oregon, to be its true and lawful attorney, for it and in its name, place, and stead, to enter into, make, and execute, in an action pending in the District Court of the United States for the District of Oregon, entitled Kilian W. Smith, plaintiff, v. Hugo V. Loewi, Inc., a corporation, defendant, Civil Action No. 4083, a supersedeas bond, as principal, in the sum of \$20,000.00 or such other amount as may be necessary to comply with the order of the said Court fixing the amount of such bond, and to sign, seal, acknowledge, and deliver the same, in contemplation of an appeal from the judgment entered in said action on the 30th day of September, 1949.

In Witness Whereof, the said corporation has caused these presents to be signed by its officer thereunto duly authorized, and its corporate seal to be hereunto affixed, this 6th day of October, 1949.

HUGO V. LOEWI, INC.

[Corporate Seal]

By /s/ ROBERT OPPENHEIM,  
Its President.

Attest:

/s/ ROBERT OPPENHEIM JR.,  
Secretary.

State of New York,  
County of .....—ss.

Personally appeared Robert Oppenheim, President, of said corporation, signer and sealer of the above instrument, he being thereunto duly authorized by the corporation above named, and acknowledged the same to be his free act and deed, and the free act and deed of said corporation, before me, this 6th day of October, 1949.

/s/ ARNOLD DE STEFANO,  
Notary Public,  
State of New York.

My Commission Expires March 30, 1951.

[Endorsed]: Filed October 10, 1949.

---

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD ON APPEAL AND DOCKETING  
APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing appeal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of Appeals and the appeal docketed in the Court of

Appeals be and the same hereby is extended to and including the 17th day of December, 1949.

Dated this 18th day of November, 1949.

/s/ CLAUDE McCOLLOCH,  
U.S. District Judge.

[Endorsed]: Filed November 21, 1949.

---

[Title of District Court and Cause.]

## STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The defendant and appellant, Hugo V. Loewi, Inc., proposes on its appeal to the Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The court erred in finding that by the agreement on August 19, 1947, the plaintiff contracted to sell and the defendant contracted to buy the entire crop of cluster hops grown by the plaintiff in 1947 on his premises in Marion County, Oregon, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

2. The court erred in finding that pursuant to said contract the plaintiff duly harvested, cured, and baled said hops grown thereon in said year in a careful and husbandlike manner, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.



3. The court erred in finding that the defendant knew that said crop of hops showed some mildew at the time said contract was entered into, and knew that said crop would in normal course show such mildew when picked and baled, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

4. The court erred in finding that such mildew in said hops did not become more prevalent or pronounced after said agreement was signed, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

5. The court erred in finding that before and at the time of picking the defendant knew that said crop, when picked and baled, would in normal course show such mildew, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

6. The court erred in finding that the defendant, on or about August 26, 1947, instructed the plaintiff to continue picking said hops under said contract, and the plaintiff did so in reliance upon such instruction, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

7. The court erred in finding that the mildew in said crop did not become more pronounced or prevalent after the defendant made the advance to the

plaintiff, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

8. The court erred in finding that the plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

9. The court erred in finding that the plaintiff, with the assent of the defendant, delivered his baled cluster hops to the warehouse and set them aside for the defendant, and appropriated them to the contract, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

10. The court erred in finding that the plaintiff duly performed all of the terms and conditions of the agreement which he was required to perform by the said contract, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

11. The court erred in finding that the defendant at all times knew it could obtain said hops upon payment of the balance of the purchase price, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

12. The court erred in finding that the defendant

refused to pay for said crop of hops on the ground that they were blighted and dirty picked, and on no other specific ground, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

13. The court erred in finding that by the term "blighted" it was meant that the hops showed some mildew effect, and by the term "dirty picked" it was meant that the hops contained over the average of eight percent leaf and stem content, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

14. The court erred in finding that at the trial the defendant advanced the same specific objection to the hops, that is, that they were blighted and dirty picked, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

15. The court erred in finding that upon the facts neither claimed defect was material, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

16. The court erred in finding that said crop of hops, at the time defendant rejected them, was not any more blighted or mildewed than when defendant contracted to buy the same, or when defendant elected to make the advance payment, or when defendant instructed plaintiff to continue picking,

and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

17. The court erred in finding that said cluster hops, when tendered to the defendant, were merchantable, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

18. The court erred in finding that the plaintiff delivered the identical hop crop which the defendant contracted to buy, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

19. The court erred in finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

20. The court erred in finding that said hops were of substantially the average quality of Oregon cluster hops accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

21. The court erred in finding that said hops, upon tender and delivery, substantially conformed to the quality provisions of the written agreement of August 19, 1947, and in basing the judgment thereon, such finding; being clearly erroneous and unsupported by substantial evidence.

22. The court erred in finding that there became due and owing from the defendant to the plaintiff the sum of \$8,846.52, the contract price less the advance.

23. The court erred in deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties with respect to the cluster hops on his part to be performed.

24. The court erred in deciding that the property in said cluster hops passed to the defendant.

25. The court erred in deciding that the defendant wrongfully refused to and did not perform its obligation under said contract of August 19, 1947.

26. The court erred in deciding that the measure of the plaintiff's recovery so far as the cluster hops are concerned, is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale of the plaintiff's hops.

27. The court erred in failing and refusing to apply the provision in said contract of August 19, 1947, which fixed and determined the measure of



damages as the difference between the contract price of the hops the defendant was obligated to accept, and the market value thereof.

28. The court erred in deciding that defendant should take nothing under its counterclaim.

29. The court erred in deciding that the judgment against the defendant relating to said cluster hops should include interest at the rate of six percent per annum from October 31, 1947, to the date of judgment.

30. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: What was the result of the Schwarz analysis of Murphy mildewed hops?

Answer: I don't remember, but it was definitely impaired as compared with a prime, fully matured, ripe hop.

31. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: Is the brewing value a matter subject to chemical analysis?

Answer: Only as to the resin content, the Alpha, Beta, and Gamma resins in the hops.

32. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: Is it a matter that brewers do

know about and take some interest in; is that correct?

Answer: Some brewers don't make any examination. I would say the bulk of the brewers—I think there are about 420 active brewers in the United States, and I would say probably 300 or 320—this is again a guess on my part—make no chemical analysis of their hops. There are certain concerns that make laboratory tests, undoubtedly.

33. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: I believe you said the other day that some of the larger brewers and growers maintain their own laboratories?

Answer: I would say that all of the larger and some of the smaller ones have their own laboratories. It is becoming more and more so.

34. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: Do I understand you to say that such a burr, where there is just a slight trace of mildew on a petal, the brewing quality of that probably would not be affected?

Answer: That would be my judgment, that the hop outside of a little discoloration on the outside, is not seriously damaged. If they were all like that, the damage would be considered very slight and probably would not impair the value of the hops or the brewing value, as you express it.

35. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: From your experience in the analysis of hops you recognize, and of course it is common knowledge, that the soft resins of hops found in the lupulin are what go to make the flavor in the beer?

Answer: There are other constituents besides the soft resins.

36. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Would you explain that?

Answer: The hop oils have a lot to do with aroma and flavor. The soft resins, I believe, are considered constituents, the constituent which imparts the bitterness to beer.

37. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: So that the volatile oils and soft resins are the desirable parts of the hop from the standpoint of making beer; is that correct?

Answer: I think so.

38. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: I will ask the Bailiff to hand you three exhibits, Nos. 25, 36, and 37, so that you may

have those before you. Referring to all of them generally, are those written reports signed by you giving the results of the chemical analyses of various lots of hops?

Answer: Yes.

39. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Will you look down the list (referring to the report of September 20 made at the request of Mr. Paulus) until you find sample No. 64, and then will you state for us, refreshing your recollection on it from that report, what the result was of your analysis of that sample of the Smith cluster hops?

Answer: The Alpha resin was 4.81% ; Beta resin, 8.75% ; preservative value, 67.3.

40. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: How did you arrive at the preservative value figure which is there?

Answer: The preservative value is one index of the quality of the hop from a chemical standpoint, and it is arrived at by taking the percentage of Alpha resins and adding to that one-third of the percentage of Beta and multiplying that sum by 100. It just gives a convenient index for indicating the quality from the standpoint of the antiseptic properties of those soft resins.

Question: And the antiseptic property is one of the things that makes the beer keep; is that right?

Answer: That is correct.

Question: So that that is an index of some value in determining the quality of the hop; is that correct?

Answer: It is considered so.

41. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Now, will you look at the next report which is dated January 15, 1948. I will ask you if that is the report of an analysis made to Mr. Smith on a batch of his '47 hops?

Answer: Yes.

Question: Would you give us likewise the results of that examination?

Answer: The Alpha resin, 5.05%; Beta resin, 9.55%; preservative value, 82.3.

42. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Would you then look at the report of January 30 and looking at the first part of that report, give us the results of that examination of a sample of his 1947 clusters?

Answer: Alpha resin, 4.36; Beta resin, 9.63; preservative value, 75.7.

43. The court erred in admitting evidence on behalf of the plaintiff as follows:



Question of plaintiff's attorney propounded to witness Bullis: Now, referring down further in that report of January 30, and with these figures before you as to the results of three different samples from Mr. Smith's 1947 hops, how would you say that those figures compared with the average of the commercial lots of 1947 clusters which you had occasion to make such tests of?

Answer: Why, they run very close to that average value, I would say.

Question: Would you state into the record what the average of such analyses for Oregon was for 1947?

Answer: Of 29 commercial lots which we had occasion to test from the 1947 crop, the average values were: Alpha resins, 4.61; Beta resins, 8.75; preservative value, 75.3.

44. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: How do those compare with the figures in that same report given for his hops?

Answer: They are somewhat lower.

Question: So that his hops analyze somewhat higher than the average?

Answer: That particular sample did.

45. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: The other samples didn't give quite exactly the same results. Would you say that

it would be fair to take an average of the three different tests that were made; would that give a true picture?

Answer: I would have to know how the samples were drawn before I could answer that question. If the samples were properly drawn, representing a proper number of bales for sampling a lot, I should think an average of the three values would be all right to accept as representing the samples.

46. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: So that from the standpoint of chemical analyses, the average of those three different tests would be approximately the same as the average of the 1947 crop that you tested; is that correct?

Answer: I believe that would be calculated to about that, yes.

47. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: In the hop itself, what is the substance that makes the hop useful for brewing beer?

Answer: They use what they call the lupulin.

48. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Gesch-

will v. Hugo V. Loewi, Inc., Civil Action No. 4082: If mildew were to touch the outside petals and turn them reddish or orange colored, would that normally affect the lupulin on the inside of the hop?

Answer: Not if it is in the later season. I imagine if it is in the real early stage it wouldn't make no hop, but later on it don't affect it at all.

49. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: What was the custom generally, in the business with respect to whether weighing in was an acceptance of hops?

Answer: That was the custom; when they was weighed, when they went over the scale and there was nothing wrong with the hops.

50. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: Is that lupulin what the hop is used for in making beer?

Answer: That is what I understand, the main property of it.

51. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Gesch-

will v. Hugo V. Loewi, Inc., Civil Action No. 4082: What is the understanding in the hop trade generally as to what use of the hop is made in making beer? That is, insofar as it is common knowledge in the hop business.

Answer: It is my general understanding that the hop is used primarily for flavor and aroma.

52. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: What portion of the hop does that aroma come from?

Answer: From the lupulin, primarily, as I understand.

53. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: If there was an attack of downy mildew sufficient to discolor the petals, make some of the petals turn a slightly reddish tinge, but not enough to get inside the petals, would that ordinarily affect the lupulin quality?

Answer: I never thought so. That, again, is a very debatable question. As you know, we have 1,200 or 1,400 brewers in the United States or whatever it may be—I do not have the number. Brewmasters, of course, do not—they might use them

or buy them even though they showed that discoloration.

54. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: Even with some discoloration of the petals, the hop is usually considered marketable?

Answer: Yes, I would consider them so.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for

Defendant-Appellant.

State of Oregon,

County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Statement of Points on which Defendant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 5, 1949.

STUART W. HILL,

Of Attorneys for

Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 5, 1949.



[Title of District Court and Cause.]

DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

Defendant, Hugo V. Loewi, Inc., hereby designates for inclusion in the record on appeal the following portions of the record, proceedings, and evidence:

1. Transcript on removal from the Circuit Court of the State of Oregon for the County of Marion.
2. Motion to dismiss, to strike, and for more definite statement.
3. Order reserving decision on motion.
4. Amended answer.
5. Reply to counterclaim.
6. Findings of fact and conclusions of law.
7. Memorandum of decision.
8. Judgment.
9. Notice of appeal.
10. Supersedeas bond.
11. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949.
12. Statement of points on which defendant intends to rely on appeal.

13. This designation of contents of record on appeal, and all counterdesignations or further designations.

14. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case.

15. The following exhibits:

(a) Plaintiff's exhibits having the following numbers: 13, 14, 16, 17, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33-A, 33-B, 33-C, 34, 35-A, 35-B, 35-C, 35-D, 35-E, 35-F, 35-G.

(b) Defendant's exhibits having the following numbers: 1, 2, 3, 4, 5, 6, 7, 8, 9, 36, 37, 42, 43, 44, 45, 45-A, 46, 47, 48, 49, 50, 51, 52-A, 52-B, 52-C, 52-D, 52-E, 53-A, 53-B, 53-C, 53-D, 53-E, 53-F, 53-G, 54-A, 54-B, 54-C, 54-D, 54-E, 54-F, 54-G, 55-A, 55-B, 55-C, 55-D, 55-E, 55-F, 56, 57-A, 57-B, 57-C, 57-D, 57-E.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Defendant-  
Appellant.

State of Oregon,  
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of Contents of Record on Appeal and have carefully compared the same

with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated ..... , 1949.

STUART W. HILL,

Of Attorneys for Defendant-  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 5, 1949

---

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL  
OF EXHIBITS

On motion of the defendant and appellant, Hugo V. Loewi, Inc.,

It Is Ordered That the Clerk of this court forward to the United States Court of Appeals for the Ninth Circuit, in connection with the appeal of the above-entitled cause, all of the original documentary exhibits in accordance with the usual practice of this court in regard to the safekeeping and transportation of original documentary exhibits.

It Is Further Ordered That the Clerk of this court be and he hereby is authorized to permit Kerr & Hill, attorneys of record for the defendant and appellant, to withdraw all of the other exhibits in this cause from the office of the Clerk of this court

in order that they may be shipped to the United States Court of Appeals for the Ninth Circuit.

Dated this 7th day of December, 1949.

/s/ CLAUDE McCOLLOCH,  
U. S. District Judge.

[Endorsed]: Filed December 7, 1949.

---

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-  
TIONAL CONTENTS OF RECORD ON  
APPEAL

Kilian W. Smith, plaintiff and appellee, hereby designates the following additional portions of the record, proceedings and evidence in this cause to be included in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit:

1. Plaintiff's Exhibits 10, 11, 12, 15, 18 and 23.
2. Defendant's Exhibits 38, 39, 40 and 41.
3. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records on appeal to the United States Court of Appeals for the Ninth Circuit from the United States District Court for the District of Oregon in Civil Action No. 4082, Fred Geschwill, Plaintiff-appellee, vs. Hugo V. Loewi, Inc., a corporation, defendant-appellant, and in Civil Action No. 4158,

O. L. Wellman, plaintiff-appellee, vs. John I. Haas, Inc., a corporation, defendant-appellant. (Those two actions involve common questions of law and fact with this action; and on trial the parties to all three actions consented, and the District Court ordered, that the three actions be tried jointly and that the evidence in any of said actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together to the extent that such evidence was pertinent, material and relevant.)

Dated at Portland, Oregon, this 14th day of December, 1949.

ROY F. SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM E. DOUGHERTY,

Of Attorneys for Plaintiff-  
Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed December 14, 1949.

---

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD ON APPEAL AND DOCKETING  
APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing ap-



peal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of Appeals and the appeal docketed in the Court of Appeals be and the same hereby is extended to and including the 31st day of December, 1949.

Dated this 15th day of December 1949.

/s/ CLAUDE McCOLLOCH,  
U. S. District Judge.

[Endorsed]: Filed December 15, 1949.

---

[Title of District Court and Cause.]

### DOCKET ENTRIES

1948

Apr. 23—Filed Transcript on Removal from Marion County.

Apr. 28—Filed motion to Dismiss, to Strike and for more Definite Statement.

May 10—Record of hearing on motion of deft. to dismiss complaint, to strike and for more definite statement argued and taken under advisement. McC

May 21—Filed Memorandum (See 4082). McC

June 1—Defts Answer to Ptffs complaint Killian W. Smith.

1948

June 21—Filed reply of plntf to counterclaim of defendant.

July 30—Filed memorandum of opinion (see Civ 4082) motions reserved to P.T. or T. McC

Dec. 13—Entered order setting for Pre trial Conf. on Jan. 17, 1949. Fee

Dec. 15—Entered order setting for trial on Jan. 25, 1949. McC

1949

Jan. 17—Filed stipulation re depositions for defendant & plaintiff.

Jan. 17—Filed depositions of Lamont Fry, James A. Byers and C. W. Paulus.

Jan. 17—Record of pre-trial conference. McC

Jan. 20—Issued subpena and 10 copies to Atty. Stewart Hill.

Jan. 22—Filed deposition of Kilian W. Smith.

Jan. 28—Issued Subpoena & one copy to Pltf.

Jan. 27—Record of trial before court. McC

Jan. 28—Filed subpena with return.

Jan. 28—Record of trial before court. McC

Jan. 28—Filed amended answer.

Feb. 3—Record of further trial before court; arguments & order allowing ptff to Feb. 17 to submit brief & deft. to March 2, 1949. McC

Mar. 4—Filed ptffs supplemental memorandum.

Mar. 17—Filed defts reply brief.

June 15—Filed ptff's reply memorandum.

June 15—Filed memorandum of decision (for ptff).  
McC

1949

- July 25—Entered order setting hearing in settlement of Findings of Fact & Conclusions of Law for Sept 12, 1949. McC
- Sept. 7—Lodged Findings of Fact proposed by deft.
- Sept. 7—Filed objections to F & F & Con. of L proposed by ptff.
- Sept. 19—Record of hearing on Findings of Fact & Conclusions of Law—argued & reserved. McC
- Sept. 22—Filed & entered Findings of Fact & Conclusions of Law. McC
- Sept. 30—Filed defts objection to form of proposed judgment.
- Sept. 30—Filed & entered judgment for plaintiff for \$8,846.52 and \$6,497.26 & int. on both sums at 6% from Oct. 31, 1947. McC
- Sept. 30—Entered judgment in Lien Docket.
- Oct. 8—Filed plaintiff's cost bill.
- Oct. 10—Filed stipulation concerning amount of supersedeas bond.
- Oct. 10—Filed and entered order fixing amount of supersedeas bond. McC
- Oct. 10—Filed notice of application for taxation of costs.
- Oct. 10—Filed supersedeas bond.
- Oct. 10—Filed notice of appeal by defendant.
- Oct. 11—Mailed copy of notice of appeal to Roy F. Shields and William E. Dougherty.
- Oct. 26—Filed stipulation for order granting leave to amend supersedeas bond.

1949

Oct. 26—Filed and entered order granting leave to amend. McC

Nov. 15—Filed in duplicate transcript of testimony.

Nov. 18—Entered order extending time for filing record on appeal to December 17, 1949.  
McC

Nov. 21—Filed motion for above order.

Nov. 21—Filed above order.

Dec. 5—Filed statement of points.

Dec. 5—Filed designation of contents of record.

Dec. 7—Filed and entered order for transmittal of exhibits. McC

Dec. 14—File appellee's designation of record on appeal.

Dec. 15—Filed and entered order extending time to file appeal. McC

United States District Court  
District of Oregon  
Civil No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,  
Defendant.

January 27, 1949

Before: Honorable Claude McColloch,  
Judge.

Appearances:

RANDALL B. KESTER,  
WILLIAM E. DOUGHERTY,  
MAGUIRE, SHIELDS, MORRISON &  
BAILEY,  
Attorneys for Plaintiff.

ROBERT M. KERR,  
STUART W. HILL,  
Attorneys for Defendant.

TRANSCRIPT OF TESTIMONY  
AND PROCEEDINGS

Mr. Kester: In this case, if your Honor please, a number of exhibits have been previously identified in connection with the depositions and they have



been marked, up to and including as of this time, Exhibits 1 to 51, inclusive, including a quantity of samples, paper-wrapped samples, which I believe have been given [1\*] No. 35.

In order to expedite matters, I will at this time offer all the documents and samples.

In this connection I will state that the samples were taken from Mr. Smith's crop, which is now in storage at the Oregon Electric warehouse in Salem. They were taken within the last few days.

The Court: They are admitted and, likewise, defendant's exhibits are admitted on the same basis, subject to any objections that may be made at this time or that hereafter may be made before the case is finally submitted.

Mr. Kerr: If there are any objections as to relevancy, they will be raised later.

The Court: They may be stated at any time prior to the submission of the case.

Mr. Kerr: Yes.

(The following exhibits were thereupon received in evidence:)

Defendant's Exhibit 1. Contract dated August 19, 1947, between Kilian Smith and Hugo V. Loewi.

Defendant's Exhibit 2. Agreement dated August 19, 1947, signed by Kilian W. Smith, relating to sale of Prime Hops. [2]

Defendant's Exhibit 3. Letter dated October 16, 1947, C. W. Paulus to Kilian Smith.

---

\* Page numbering appearing at top of page of original Reporter's Transcript.

Defendant's Exhibit 4. Letter dated September 17, 1947, signed Kilian W. Smith to Hugo V. Loewi, Inc. (Selection of growers' market price).

Defendant's Exhibit 5. Letter dated October 3, 1947, signed Kilian Smith addressed to Hugo V. Loewi, Inc., authorizing inspection and grading, etc.

Defendant's Exhibit 6. Letter dated September 17, 1947, Kilian W. Smith to Hugo V. Loewi, Inc. (Selection of growers' market price).

Defendant's Exhibit 7. Check, August 20, 1947, C. W. Paulus, payable to Kilian Smith in amount \$3,500.

Defendant's Exhibit 8. Check, August 27, 1947, C. W. Paulus, payable to Kilian W. Smith, in amount \$3,000.

Defendant's Exhibit 9. Check, October 25, 1947, C. W. Paulus, payable to Kilian W. Smith, in amount \$3,497.26.

Plaintiff's Exhibit 10. Carbon copy of letter dated November 19, 1947, Maguire, Shields & Morrison to C. W. Paulus.

Plaintiff's Exhibit 11. Hop Sample Advice, dated September 10, 1947.

Plaintiff's Exhibit 12. Hop Sample Advice, dated October 4, 1947.

Plaintiff's Exhibit 13. Weight slip covering 73 bales, Kilian Smith hops. [3]

Plaintiff's Exhibit 14. Hop Inspection Certificate, dated September 15, 1947.

Plaintiff's Exhibit 15. Carbon copy of telegram dated September 8, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 16. Letter dated September 16, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 17. Telegram, September 16, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 18. Copy of telegram dated September 17, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 19. Photostat copy of telegram, September 17, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 20. Letter dated September 18, 1947, Hugo V. Loewi, to C. W. Paulus.

Plaintiff's Exhibit 21. Telegram, September 18, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 22. Carbon copy of letter dated September 20, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 23. Hop Sample Advice, September 20, 1947.

Plaintiff's Exhibit 24. Letter dated September 22, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 25. Letter dated September 26, 1947, D. E. Bullis, Chemist, Agricultural Experiment Station, [4] Oregon State College, to C. W. Paulus, giving analysis of hop samples.

Plaintiff's Exhibit 26. Telegram dated September 30, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 27. Letter dated September 30, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 28. Telegram dated October 16, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 29. Letter dated October 16, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 30. Telegram dated October 22, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 31. Copy of telegram dated October 22, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 32. Telegram dated October 23, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 33-A. Hop Inspection Certificate dated August 27, 1947.

Plaintiff's Exhibit 33-B. Weight Slip, 59 bales Kilian W. Smith hops.

Plaintiff's Exhibit 33-C. Hop Purchase Invoice dated October 25, 1947.

Plaintiff's Exhibit 34. Letter dated October 23, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 35. Hop Samples.

Defendant's Exhibit 36. Letter dated January 15, 1948, D. E. Bullis, Chemist, Agricultural Experiment Station, Oregon State College, to Kilian W. Smith, analysis of [5] hop samples.

Defendant's Exhibit 37. Letter dated January 30, 1948, D. E. Bullis, Chemist, Agricultural Experiment Station, Oregon State College, to Kilian W. Smith, analysis of hop samples.

Defendant's Exhibit 38. Letter dated April 15, 1948, Hugo V. Loewi, Inc., by C. W. Paulus, to Kilian W. Smith.

Defendant's Exhibit 39. Carbon copy of letter dated March 15, 1948, Maguire, Shields, Morrison & Bailey to J. B. Henshaw, Oregon Electric Railway Company.

Defendant's Exhibit 40. Carbon copy of letter dated March, 1948, Hugo V. Loewi, Inc., to Kilian W. Smith.

Defendant's Exhibit 41. Letter dated November 12, 1947, J. B. Henshaw, Agent, Oregon Electric Railway, to Kilian W. Smith.

Defendant's Exhibit 42. Mimeograph circular, United States Hop Growers' Association, August 23, 1947.

Defendant's Exhibit 43. Hop Sample Advice, September 10, 1947 (original).



Defendant's Exhibit 44. Telegram dated October 1, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 45. Telegram dated September 25, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 45-A. Hop Sample Advice, September 10, 1947 (original). [6]

Defendant's Exhibit 46. Hop Sample Advice, September 20, 1947 (original).

Defendant's Exhibit 47. Hop Sample Advice, October 4, 1947 (original).

Defendant's Exhibit 48. Letter dated September 25, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 49. Letter dated October 22, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 50. Carbon copy of letter dated October 27, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Defendant's Exhibit 51. Letter dated October 29, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 52-A to 52-E. Five original tenth-bale inspection samples taken from Lot 64 of Kilian Smith 1947 crop clusters.

Defendant's Exhibit 53-A to 53-G. Seven samples, splits of tenth-bale samples taken from Kilian Smith crop upon inspection.

Defendant's Exhibit 54-A to 54-G. Seven original type samples taken from Kilian Smith lot prior to inspection of later samples.

Defendant's Exhibit 55-A-to 55-F. Six inspection samples of Kilian Smith Fuggle Lot No. 14.

Defendant's Exhibit 56. One type sample of Kilian Smith fuggle lot.

Defendant's Exhibit 57-A to 57-E. Hop samples.

---

### KILIAN W. SMITH

the Plaintiff herein, was thereupon produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kester:

Q. State your name, please.

A. Kilian W. Smith.

Q. You are the plaintiff in the case here, No. 4083, is that right?      A. Yes, sir.

Q. Where do you live, Mr. Smith?

A. Live two and a half miles south—or north-west of Donald.

Q. Where is that with respect to other locations? Is that in the Willamette Valley?

A. Yes, the northern corner.

Q. Do you have a hop ranch there?

A. Yes.

Q. Are you engaged in any other business besides raising hops?

(Testimony of Kilian W. Smith.)

A. At present, also engaged in the retail farm implement business.

Q. Where is that location?

A. In Woodburn.

Q. State your experience in dealing with hops, growing them, or whatever you have had to do with hops.

A. Several years ago,—I think in 1935,—we seeded a hopyard on some rented land, and I operated that same property for three [8] years, and after that time I helped my father in the furniture business. Then, again in 1943, I purchased a hop ranch of my own and I still live there and operate that.

Q. Since 1943 have you been continuously in the business of raising hops? A. Yes.

Q. Have you engaged at any time in buying and selling hops? A. Yes.

Q. State your experience in that connection.

A. I worked for the J. W. Seavey Hop Company as a buyer and field man; helped inspect hops. Started with them in the fall of 1943, I think, during 1943, 1944, 1945 and 1946.

Q. As commission man for J. W. Seavey, how did you operate, in a general manner?

A. I had orders to buy spot hops and make contracts, term contracts, and I had the north end of the valley here.

Q. In that connection did you examine various crops of hops, take samples, and inspect the samples and inspect the bales and do things of that sort?

(Testimony of Kilian W. Smith.)

A. Yes.

Q. Did Mr. Seavey, or the Seavey Company, buy and sell hops on the basis of the inspections that you had made? A. Yes.

Q. Have you had experience generally in determining the quality and condition of hops? [9]

A. Yes, some.

Q. In the course of your experience in growing hops, have you had experience in selling your own crop that you have grown there?

A. You mean to dealers?

Q. To dealers or otherwise, whatever it has been. A. Yes.

Q. What has been your experience with your own crop on the place that you are now? Have you been contracting or have you——

A. I usually try to contract them, to contract half of my crop, and sell the other half on the open market.

Q. Did you make a practice of contracting early in the season or late in the season, or was there any particular rule on that?

A. Well, during the war years I contracted at the OPA ceiling price. I had a term contract of five years.

Q. So that takes care of the early years of your ranch experience? A. Yes.

Q. What sized ranch do you have?

A. I have 127 acres.

(Testimony of Kilian W. Smith.)

The Court: What was the wartime price, the ceiling price?

Q. (By Mr. Kester): Would you state, Mr. Smith?

A. It was 64 cents a pound based on eight-per cent pick, and over six per cent seeds there was a premium of one cent a pound.

The Court: 64 cents base.

The Witness: 64, yes. [10]

Q. (By Mr. Kester): Were contracts during the war and during the OPA regime made on a sliding scale, similar to these open-end contracts, as far as premiums and discounts were concerned?

A. Well, yes. It is the same. Some of the first ones of the lot——

The Court: You don't need to go into detail. There were premiums and discounts?

The Witness: Yes, and there was a stipulated floor price.

Q. (By Mr. Kester): Did they permit the use of the grower's market price at all?

A. If it was above ceiling price. If the ceiling was raised, the grower was entitled to any raise.

Q. On your ranch how many acres of hops have you had in recent years?

A. When I first moved out to the ranch, there was 22½ acres in fuggle hops and two years later I cleaned up a new piece of ground and set out another seven and a half acres of late clusters.

Q. At the present time is that the size of your hop acreage?           A. Yes.



(Testimony of Kilian W. Smith.)

Q. What has been your experience, as far as production on the place in number of bales is concerned? Do you recall?

A. It is an average of seven bales to the acre.

Q. Of both fuggles and clusters? A. Yes.

Q. Referring now to the 1947 season and the 1947 crop, state in [11] a general way what cultivation measures you took during the growing season in 1947?

A. Well, we cultivated as often as necessary. We tried to keep the ground in good condition, free of weeds, and tried to hold our moisture well, and of course we had fertilized early at plowing time, and we were very particular in cultivating this hopyard.

Q. Did you irrigate either the fuggles or clusters? A. Not in 1947.

Q. Did you do anything by way of dusting or spraying or things like that?

A. Oh, yes, regularly, once a week in the clusters.

Q. How about the fuggles?

A. Yes, we dusted for lice.

Q. Did you take the usual and customary procedures for the control of insects and diseases in your yard? A. Yes.

Q. Is that in accordance with the usual farm practice in that vicinity? A. Yes.

Q. How did you pick your hops? Did you use machine-picking or hand-picking?

(Testimony of Kilian W. Smith.)

A. I hand-picked up until the 1948 crop.

Q. The 1947 crop, then, was hand-picked?

A. Yes. [12]

Q. State what your experience was with picking in 1947.

A. In the early part of the season the picking situation was generally pretty bad, due to the fact that some of the fuggles crop matured very early. There was one crop down there that was picked on the 4th of July. We picked from the 4th of July until the middle of or towards the end of August. They had six or eight weeks there of picking time because the different crops matured at varying times.

Then, of course, when we went into the late hops—Most of the growers had more acreage of late clusters, and picking started with us about the same time; within a week, why, most of the yards were starting to pick and then pickers became scarce. They moved to the various yards, and it was a difficult job to keep a crew.

Q. What did you have to do in order to keep a crew of pickers?

A. Just had to nurse them.

Q. Where did you get your pickers, for instance?

A. We used a certain amount of local people, and I ran a truck from Newberg and one from Oregon City and then, later in the cluster season, I got hold of a Negro crew from Vanport.

(Testimony of Kilian W. Smith.)

Q. Was there much transient labor that season to help in picking?

A. Yes; not a whole lot that were transient, but they moved from one yard to the other.

Q. What was the picking price in 1947? What did you pay pickers?

A. In the early fuggles we started out at three and a half cents [13] and the lates, we started at three and a half cents, but were later forced to go higher. In one case I had to go to five cents and also pay 50 cents per head to get this Negro crew, and also there was other supervisory and transportation expense.

Q. Are you able to state approximately what your cost of production was in 1947, or have you any figures of that sort?

A. I do not have any figures. I could give a general estimate.

Q. Approximately what, in your judgment, would your cost of production be per bale?

A. I would say, approximately, on the fuggles they ran around 45 cents.

Q. Is that per pound or per bale?

A. Per pound; maybe 50 cents, somewheres in there.

Q. 45 or 50 cents a pound?

A. Yes, and the late clusters, due to higher picking costs, it ran probably 10 or 15 cents a pound higher.

(Testimony of Kilian W. Smith.)

Q. What was your experience in 1947, with respect to mildew? Did you have some in your yard?

A. Yes.

Q. How would you characterize the extent of the mildew in your yard?

A. Well, I looked at a number of yards throughout the valley and I considered the extent of mildew in mine was less than most yards.

Q. About when did the mildew first appear in your yard? [14]

A. About the 1st of August or the latter part of July.

Q. Was there mildew in the fuggles as well as in the clusters?

A. There might have been a very slight touch.

Q. Generally speaking, fuggles are more resistant to mildew, are they? A. Yes.

Q. From that time on what was your experience with mildew in the yard? Did you have it under control, or did it get worse, or did it get better, or what was the situation?

A. Well, we had it under control until it hit the hops after they were—after they had formed.

Q. Did some mildew hit the hops after they formed? A. Yes.

Q. How would you characterize the extent of the mildew? Little or much?

A. Well, it hit the hops while they were maturing and it discolored them; they showed spots from mildew.

(Testimony of Kilian W. Smith.)

Q. Could you tell us approximately what your picking dates were for both fuggles and clusters?

A. I think we started about the 10th of August on the fuggles and finished about the 18th, and then we laid off for about a week and started in the lates about the 25th of August and finished on them around the 3rd of September.

Q. In that picking did you make any attempt to eliminate or avoid those vines which were particularly severely hit by mildew? [15]

A. Yes.

Q. What did you do and how were you able to do that? Would you describe what your procedure was?

A. The pickers themselves more or less took care of that. In other words, if there were a lot of small hops, undeveloped hops or nubbins, as they were called, on a vine, the picker would naturally pass them up because it would not make any weight in his basket.

However, there were hops with good clusters on, long strippers, and there might have been a few mildewed hops along with them that naturally went into the basket, but, in general, the heaviest branches, the heaviest infested branches, were passed up, and we estimate that they left about 25 percent of the hops on the vines. There were some on all the vines that they left.

Q. Before picking, did you make any estimate of what your probable production would be?



(Testimony of Kilian W. Smith.)

A. At the time we started picking, I estimated we would have 200 bales.

Q. What, in fact, did you get, Mr. Smith?

A. Seventy-three.

Q. Was that on your fuggles or clusters?

A. Clusters.

Q. Did you make any estimate or is it possible to estimate approximately the extent to which the yards were hit by mildew? [16] Is it possible to make any judgment of percentage or amount, or anything like that?

A. Well, it would be pretty hard to estimate it exactly. All we could do is from comparisons with other yards, and in my yard I would say that possibly 50 per cent of the hops had some—had been hit by mildew at some stage or another, in their growth or their development.

Q. The other 50 per cent, then, would not be picked, is that it? A. Yes.

Q. Are you able to estimate now the amount of those that were affected by mildew that were left in the yard, as you have described?

A. Well, those that were left, the greatest portion were those infected hops.

Q. Have you any way of estimating the percentage that would be of the total, affected by mildew?

A. Again, I would have to guess. It would probably be around—those that were left, they were the ones that were mildewed.

Q. Yes. You had a contract here, of course,

(Testimony of Kilian W. Smith.)

with Hugo V. Loewi, Inc., for both your fuggles and your clusters, is that correct?

A. Well, I had a prior contract, a 100-bale contract, with Mr. Seavey for 100 bales on the fuggles. He was to receive the first 100 bales and we raised 159 bales of fuggles, so we contracted the balance of the fuggles and the entire late crop to Hugo V. Loewi, Inc. [17] .

Q. Would you relate the circumstances under which the contract between yourself and Hugo V. Loewi, Inc., was entered into? How did it happen?

A. Mr. Fry came out to visit me about the middle of August and inquired whether I was still connected with the Seavey Hop Company. I told him that I had left the Seavey Company in the spring and was no longer connected with them, and he wanted to know if my hops were open, then. I told him yes, they were, that anybody could buy them.

Q. What happened? Was there any further conversation?

A. Then he stated that he might be able to secure me an 80-cent floor contract, and wanted to know whether I would be interested in it or not, and I stated I would definitely sell the extra fuggles and the entire lot—the entire late crop, and he said at that time he was primarily interested in fuggles—it was the early stage of the game—and, so, I told him if he wanted to—I wanted to sell the whole bunch together. So he went back to his office and

(Testimony of Kilian W. Smith.)

he saw him on several different occasions, but he came back on a different date, a later date, and said that they could take the whole crop.

Q. On any of these visits did he go out and look at the hopyard?

A. Yes. On his first visit, why, he—I told him my cluster hops were mildewed and told him all he wanted to know—I told him I wanted to know that before he talked to his boss about contracting them for me. He told me he had been around the [18] valley the last few days with his buyers and he said he knew there was mildew in the valley. I said, “You had better look at mine and see how bad they are and see if you really want to buy them,” because in my experience in buying hops I would like to know what the crop looked like, especially at that time, because they were ready for harvesting.

He was a bit reluctant to go back and look at the crop but he finally did go back, and we walked through the whole yard, and I asked him how it compared with these other yards that he had seen through the valley and he said that some yards were much worse and some were better—I mean in better condition as far as mildew infection was concerned.

I told him I wanted to be sure and let his boss know what they were like before he contracted them, so at a later date he came and signed me up on a sales slip.

Q. Did he ask you; or, rather, I mean, did you

(Testimony of Kilian W. Smith.)

ask him at the time of his first visit about whether or not they would be acceptable hops for them to buy?

A. He said they needed hops, and he didn't see how they could buy hops that were not mildewed because most of them in the valley were mildewed.

Q. Did he state whether or not he had instructions to buy all the hops he could get his hands on or something like that?

A. Yes. He said he wasn't very busy; in fact, he wanted to know whether I knew of any other lots that were open. [19]

Q. At that time you say you went through the yard. Was that just the cluster yard or were fuggles still being picked?

A. We were still picking a few fuggles; we were winding up on the fuggles, and we had to walk through the fuggle yard, or drive, to get to the late cluster yard. The late cluster yard lies directly behind the fuggle yard.

Q. Did he see the fuggles being picked, as well as the clusters, do you know?

A. Oh, he must have.

Q. Did you discuss with him at that time what the probable production would be?

A. I told him it was very difficult to judge it exactly, and we could make a conservative estimate of 50 bales.

Q. You say he came out again and—at a later time?

A. Yes.

(Testimony of Kilian W. Smith.)

Q. What happened? Do you know about when that was, approximately?

A. I think it was about the time we were finishing the fuggles. It must have been around the 18th or 19th of August.

Q. To refresh your recollection, the sales slip which is marked here is dated August 19th. Was it prior to that time?

A. Well, he had made about three or four trips out to see me. I was inquiring from other buyers what the market price was, and I did not stipulate I was going to sell immediately on his prior visits.

Q. I hand you Defendant's Exhibit No. 2, which has been marked [20] here, the sales slip dated August 19, 1947. Will you state the circumstances under which that was signed?

A. Well, it says here: "For \$1 received, I hereby sell to C. W. Paulus entire crop estimated at 50 bales of lates of prime hops like sample received, own growth, crop 1947, at 81 cents floor or market until October 31st, cents per pound, premium and discount."

Q. Will you tell us how you happened to sign that? What approximate date was it when he brought it out? Tell us all about it.

A. Mr. Fry brought this out after he had talked with his boss, and he wanted me to execute it. He wanted to tie me up on a sales slip. We stood right in the yard, and on previous days he stipulated that there was an 80-cent floor, and on this day he



(Testimony of Kilian W. Smith.)

came out he said, "I will give you the advantage of another cent. The market has gone up a cent since last night," so that is the reason it happened to be 81.

Q. Do you know about what time of day that occurred?      A. I think it was in the morning.

Q. Did he at that time go out and look at the yard again, or was there any discussion about your yard?

A. No, he looked at the yard prior to the signing of this.

Q. When he brought this out, he did not look at it again at that time?      A. No.

Q. That refers only to the lates, does it? [21]

A. Yes.

Q. Was there a similar slip signed for your fuggles?      A. There must have been.

Mr. Kester: I don't think that has been produced here. Will it be stipulated that there was a similar sales slip for the fuggles?

Mr. Kerr: Yes.

Q. (By Mr. Kester): The fuggles deal was only for the excess over the Seavey contract, is that right?

A. These hops were picked at that time. They were not baled yet.

Q. I hand you Exhibit No. 1, which is the contract, and ask you if that is the cluster contract signed on the day following this sales slip? You can look at the back of it and see your signature on there.      A. Yes.

(Testimony of Kilian W. Smith.)

Q. What were the circumstances under which that contract was signed? Who brought that out?

A. Mr. Byers brought this out the following day.

Q. Is he an employee of C. W. Paulus likewise?

A. Yes.

Q. What was the conversation at the time he brought the contract out to be signed?

A. Oh, we didn't have much conversation. It seems to me that I was gone to the hop warehouse at the time and I came back and [22] he was sitting in his car in the yard, and he handed me that contract to sign and also a check for \$3500 advanced on the fuggle crop.

Q. He had a contract for the fuggles as well as for the clusters?           A. Yes.

Mr. Kester: I don't think the fuggles contract has been produced, but I think we can stipulate that there was a contract on the fuggles for the amount over the Seavey contract. Is that correct?

Mr. Kerr: It is so stipulated.

Q. (By Mr. Kester): Was it on the same price scale as your cluster contract?           A. Yes.

Q. You say he gave you a check for \$3500 advanced on the fuggles?

A. Yes. The fuggles had been picked, and I told him that we would not be picking the late hops for possibly another week, and he told me to let them know when we started picking the late hops and they would send the advances out on them.

I told him I had the fuggles already picked, and

(Testimony of Kilian W. Smith.)

I would probably use this \$3500 to go ahead and pick the lates, so I might not need any more money.

Q. Did he indicate whether or not that was satisfactory?           A. Yes.

Q. Your picking of the clusters began about the 25th, you say? [23]           A. I think so.

Q. And lasted until about when?

A. To the 3rd of September.

Q. After this contract was signed, did Mr. Fry or Mr. Byers or Mr. Paulus, or anyone else representing Hugo V. Loewi, Inc., come out and look at your yard again, after the contract was signed?

A. We began picking the late hops and after the second or third day, why, some of my pickers began to scatter; they had made promises to other growers that they would pick when they started, so, then, of course, the growers were bidding for pickers and we had to raise the picking price, so I became a little bit leery. I hadn't called Paulus for any advances when we started, and I thought I had better call him and have him look at the yard again and I told him to bring his checkbook along.

Q. Did you talk to Paulus personally then?

A. I don't remember. I telephoned him. It might have been one of the men in the office. I don't remember exactly who it was.

Q. What message did you give to Paulus' office? State as accurately as possible what message you gave either Paulus or his office?

A. Well, I said we were in the process of pick-

(Testimony of Kilian W. Smith.)

ing the late hops now and I wanted him to come out and look at my yard again and to bring his checkbook along to furnish me the advances.

(The Court then proceeded to the transaction of other business.)

Q. (By Mr. Kester): Pursuant to that conversation, what happened next?

A. Mr. Fry came out then about noon. We had been picking two or three days. The wires were down and the pickers were in the process of picking.

I asked him his advice on going ahead; at the present time there was no grower that was picking. We were talking about the picker situation.

I told him, "This picker situation is getting tough and we will have to go up to five cents a pound to pick them in order to hold the pickers," and he said he knew it was tough all over and he advised me——

Mr. Hill: If your Honor please, we would like to state an objection to any testimony, oral testimony, that varies the terms of the written contract, or tends to contradict the terms of the written contract, as being a violation of the parole evidence rule.

The Court: Admitted, subject to the objection.

Q. (By Mr. Kester): Lest there be any misunderstanding, I understand this conversation happened some week or two after the contract was

(Testimony of Kilian W. Smith.)

entered into, at the time when advances were made under the contract, is that correct?

A. That is right.

Q. Continue, and tell us what the conversation was. [25]

A. Well, I asked him how he liked the way we were picking and then he said, "Do the best you can. Pick them as clean as you can and be sure to get them dried properly," and I asked him to look at the baskets of the pickers, and he said, "Well, skip as many of the blighted ones as you possibly can."

Q. Did you discuss with him the amount of mildew in the yard?

A. No. We were discussing the size of the crop, that it would turn out a little heavier than we first anticipated. We had the wires down and you could see more clearly how many hops were there.

Q. Did you discuss with him the matter of leaving out some vines, the worst ones, and picking the rest?

A. Yes. He advised me to try and get the best ones.

Q. Did you discuss with him whether you might need further advances beyond the \$3,000 that he gave you then?

A. Well, I told him I thought I would have enough money with that but he says, "If you need more, why, call us up." He said, "If you have to



(Testimony of Kilian W. Smith.)

go higher and pay more than five cents a pound, you might need more money."

Q. Did you ask him whether or not you should continue picking the yard?      A. Yes.

Q. What did he say?

A. He said, "Here is the money. If you want some more, call us."

Q. How did you arrive at the amount of money that was paid to [26] you at that time?

A. Well, he said he would probably have to go on the basis of the contract, stipulating 50 bales, and we estimated it would cost about 30 cents a pound just to pick them alone. 50 bales would be \$10,000, and that figured up at about \$3,000 at 30 cents a pound.

Q. Did you agree on that figure between yourselves?

A. Yes; in fact, the check did not have any amount filled in it. It was signed by, I think, Mr. Byers, and Mr. Fry filled in the amount, the \$3,000 amount.

Q. He had a blank check when he came out?

A. Yes; it was signed, however.

Q. If you know, was it made out payable to you, when he came out there?      A. Yes.

Q. So, all he did was to fill in the amount when he got out there?      A. That is right.

Q. What was the condition of the crop at that time with respect to mildew? Did it have more or less than it had when he saw it before?

(Testimony of Kilian W. Smith.)

A. Well, it was about the same, because he had looked at it probably a week or ten days earlier, and the hops were already formed; they were simply more mature.

Q. Do you know how many had been picked at that time? [27]

A. Well, we had one kiln picked up, I think, and they were up at the hop house at that time. I told him to stop up there and check on those and to give my drier instructions on how to dry them.

Q. Did he state at that time how, in his opinion, your crop compared with other crops in the vicinity?

A. He said some were better and some were worse.

Q. Did he discuss with you the quantity of the production; that is, whether it would be up to the amount that had been estimated or not?

A. Yes, we talked about that and he said, "It is hard to determine exactly until you are through picking."

Q. At that time I take it the fuggles had already been picked, dried and baled, at the time he was out there?

A. Yes.

Q. Do you know approximately when they were delivered to the warehouse?

A. I believe we delivered them a day or two before we started to pick the lates.

Q. Do you recall what the leaf and stem content of the fuggles was?

A. I don't think that certificate was produced here. It was seven per cent pick.

(Testimony of Kilian W. Smith.)

Q. Seven percent on the fuggles? A. Yes.

Q. Wait. Seven per cent on the clusters, according to the certificate here. Were your fuggles the same?

A. The fuggles were seven per cent and the late hops were nine per cent, as I remember it.

Q. 59 bales. That was the fuggles?

A. Yes.

Q. Pardon me. That is right. That is in evidence as Exhibit No. 33-A. Here is the other one. Exhibit No. 14 shows the leaf and stem content, nine per cent on 73 bales of clusters. That is correct?

A. Yes.

Q. About when were the clusters delivered to the warehouse, if you know?

A. I would judge about a week after they were picked, possibly about the 10th.

Q. Were you present at the time they were delivered to the warehouse?

A. I delivered them to the warehouse myself.

Q. Were samples taken of them by some representative of Hugo V. Loewi, Inc., when they were delivered to the warehouse?

A. I don't recall if they took them then or not.

Q. Did they subsequently get samples at the warehouse?

A. Yes. I saw them later and—saw the samples I think in Mr. Paulus' office later.

Q. Do you know approximately when prelimi-

(Testimony of Kilian W. Smith.)

nary samples were taken [29] from the lot at the warehouse?      A. No, I don't know exactly.

Mr. Kester: Counsel has produced a hop sample sheet dated September 10th, showing a sample of 73 bales of cluster hops. May I ask Counsel if this was the first sample taken of the clusters, in order to fix the date?

Mr. Kerr: Yes. We will so stipulate.

Q. (By Mr. Kester): With that date as a reference point, if the clusters were delivered on or prior to the 10th of September, do you know about when it was you were present when samples were being taken? Was it subsequent to or was it about that time?

A. The only occasion of sampling that I can recall exactly now is the time when they took the tenth-bale inspection samples.

Q. You do not recall being present at any time when any other samples were taken?

A. I had thought Mr. Byers might have taken some samples when he was out there at one time. I had been gone downtown and came back and met him, but I didn't see anybody take any samples.

Q. What warehouse were those delivered to?

A. To the Oregon Electric warehouse in Salem.

Q. Was that a warehouse satisfactory to Hugo V. Loewi, Inc.?      A. Yes.

Q. Did they ever raise any question about the place of delivery?      A. No.

(Testimony of Kilian W. Smith.)

Q. They knew they had been delivered to that warehouse? [30]           A. Yes.

Q. Under what circumstances did you select the grower's market price for the clusters, or for both fuggles and clusters?

A. Well, Mr. Byers came out to my farm one day. I wasn't home. He spoke to my wife. I happened to be in St. Paul at the time at the blacksmith shop.

My wife told him where I was, so he came over to St. Paul and I met him there, and he asked me if I wanted to settle under the contract—if I wanted to select my price. I asked him what it was and he said they were offering 85 cents for eight per cent clusters and 90 cents for eight per cent fuggles, so I told him I would discuss it with my wife and let him know.

Q. Then did you subsequently talk to him or to someone representing Hugo V. Loewi, Inc.?

A. I believe I called Mr. Paulus' office and told him that I was willing to accept that price.

Q. Do you know whom you talked to there?

A. I believe it was Mr. Paulus.

Q. Did he indicate what would be necessary in order to effect the selection of the prices?

A. I think he told me to drop up to the office, which I did, a day or so later, and he said I would have to furnish a letter accepting my price that I selected, my grower's market price.

I told him I did not have any letter with me but



(Testimony of Kilian W. Smith.)

if he had some form—Mr. Byers had forms prior to this time when [31] he came out, offering to settle, so I suggested they could copy the form and he did there in the office, and I signed it.

Q. Will you look at Exhibits No. 4 and No. 6 and tell me if those are the forms which you signed there at that time?      A. Yes.

Q. Did Mr. Paulus indicate whether or not your price selection was satisfactory?

A. He said it was what the market was, yes.

Q. Do you know if that was the market price?

A. Yes.

Q. Did he raise any question at that time about your selection of the grower's market price?

A. He just said he would submit it to Mr. Loewi.

Q. Then at that time did you have any discussion with Mr. Paulus about your crop?

A. Oh, yes. Of course, we were discussing crop conditions in general and we were—I was inquiring of him as to the total crop, whether he had heard what the total crop was going to turn out, and he said he didn't know at the time, and of course the hop men and a lot of the hop growers were estimating what the crop might turn out to be, because there was a lot of different guesses due to this mildew, and some of the people estimated it as low as forty to fifty thousand bales in the valley, and of course the estimates ranged from there on upwards, and at the same time it seemed that some of the buyers had these low [32] estimates and they

(Testimony of Kilian W. Smith.)

were out here, some of them were out here during the season, and they figured the mildew damage was going to cut down the crops quite a little.

In fact, Mr. Paulus stated that his principal, Mr. Oppenheim, had been out inspecting several hop-yards in the valley that were blighted or mildewed, and that he made an estimate of around fifty to fifty-five thousand bales, and even offered bets, and one of them said he couldn't quite agree with Mr. Paulus; he figured there would be a few more. We discussed this high market and I asked him if the market had not gotten up to this high point on the basis of some of these guesses as to what the crop might turn out to be, and he thought that might be a factor.

Q. Did he indicate whether Hugo V. Loewi had given him any instructions to get all the hops he could?

A. Well, he said so at that time, and they were going to buy as many good hops as possible.

Q. Did he at that time discuss your crops with other crops?

A. Yes. I believe that he took down the sample that he had in the office and we looked at that. We also looked at other samples.

Q. Was there any comment made at that time relative to your samples as against other samples there?

A. Well, they showed more mildew damage and, for my own information, I asked him to show me

(Testimony of Kilian W. Smith.)

samples of other crops. He did that very obligingly. He took down samples from his racks and we [33] looked at other crop samples. We looked at some samples that showed less mildew damage than mine and we looked at some samples which showed a great deal more.

Q. Did Mr. Paulus make any comment about how your samples compared with the general average of hops raised in the valley that year?

A. Just in general terms.

Q. What was the gist or substance of the remark?

A. Well, he said it was obvious that they had some mildew; it was obvious, also, there were some better ones and some much worse.

Q. Did you ever have a sample of these hops chemically analyzed?

Mr. Kerr: May the record show, your Honor, that we object to any evidence concerning chemical analyses of hops on the ground there is nothing in the contract specifications referring to chemical analyses or the chemical content of the hops and so on and we therefore suggest that such testimony is wholly irrelevant.

The Court: What do you want to put it in for?

Mr. Kester: There will be evidence—in fact, the chemist was supposed to be here at 1:00 o'clock but I have not seen him yet, the man who made some analyses, who will testify with respect to the brewing qualities of these particular hops. I think there

(Testimony of Kilian W. Smith.)

will be evidence to show that in the trade that is of some value with respect to the quality of the hops, that it has been so recognized at least for a great many years. [34]

Mr. Kerr: We would have no objection to that, ordinarily, but, frankly, it would require us to go into an entirely collateral and independent issue, and require us to explore the chemistry of the hop, the brewing value of hops. What makes a hop of value in beer is indeed a complex and a large subject. We are prepared, if the Court so desires, to bring in brewmasters and brewers and others to testify on this subject, but we believe it is wholly irrelevant.

The Court: I will reject it until I hear the defendant's case, Mr. Kester.

Mr. Kester: May I make this remark, with respect to that, your Honor? It comes certainly as no surprise because the defendant itself had the hops analyzed. They have well known what the analysis was and what was claimed for it. If the Court is interested in it——

The Court: No, I don't want to hear it. I just want to hear from the defendant first.

Q. (By Mr. Kester): Did you submit a sample of them for chemical analysis? A. Yes.

Q. To whom did you submit it?

A. Submitted it to Mr. D. E. Bullis of the Oregon State College.

Q. Did you submit more than one sample?

(Testimony of Kilian W. Smith.)

A. Yes, I took five split samples to get a representative analysis of the entire lot. [35]

Q. Did you take samples on more than one occasion? A. No.

Q. You did not take him samples on more than one occasion? A. No.

Mr. Kester: In view of your Honor's ruling, I was expecting to call Mr. Bullis in our case in chief. We made arrangements for him to come up from Corvallis today.

The Court: Call another witness now.

Mr. Kester: I am not through with this witness yet.

Q. Do you know about when these hops were weighed in, the clusters?

A. I believe it was the latter part of—

Q. I will refresh your recollection with Plaintiff's Exhibit No. 13 which is the weight slip for seventy-three bales, with your name, dated October 3rd, and ask you if that is the date on which they were weighed in?

A. Yes, it must be. It says "October 3rd" here.

Q. Prior to weighing them in, did representatives of Hugo V. Loewi, Inc., require you to sign some agreement with respect to weighing them in?

A. Yes, he had me sign a letter, that he had prepared. I don't remember the exact wording of it.

Q. Is that Exhibit No. 5 which is being handed to you? In that respect, I will ask you whether or



(Testimony of Kilian W. Smith.)

not he stated whether or not he would weigh them in without such a letter? [36]

A. He said they were instructed to get a signature on this letter before they could even touch the hops.

Q. Then you did sign it, and they were weighed in on the 3rd of October, I take it? A. Yes.

Q. Were you present during the weighing-in?

A. Yes.

Q. Were samples taken and inspections made in the usual manner? A. Yes.

Q. Will you describe briefly what was done at that time?

A. Mr. Fry punched them and he got his handful of tryings and sampled every tenth bale, and at that time we ran across two bales that were—they had excessive moisture in them, and he told me to take them home and put some more heat under them and dry them out a little better and to bring them back again, and that he would not pass on them until I returned them; so I took them home and dried them out a little more and brought them back and he re-tried those and passed on them.

Q. At that time was any statement made with respect to the quality or condition of the hops?

A. He said at that time that he could not take them in until he had an okeh from back East.

Q. In other words, that they were neither being accepted or rejected at that time?

A. That is right. [37]

(Testimony of Kilian W. Smith.)

Q. Did you subsequently receive a letter from Mr. Paulus, which I now hand you, Exhibit No. 3, dated October 16th, wherein they rejected those clusters? A. Yes, I received this.

Q. Did you have any discussion with Mr. Paulus wherein he discussed with you specific grounds upon which they were rejecting hops?

A. Well, on one of my visits to his office—I was after him to have these hops weighed in and I wanted to get paid for them. He stated that Mr. Loewi did not like the hops and I said, “Well, he should have known what they were when he bought them,” and he said, “Well, I have to go on what Mr. Loewi said,” so we had a general conversation along that line.

Q. Did he state specifically what reason Loewi had given for rejecting the hops?

A. Well, I was there on a couple of different occasions, and I think finally he showed me a letter that he got from Mr. Loewi, and it stated that the hops were dirty-picked and badly baled.

Q. Did he ever raise any objection to any other feature of the hops besides “dirty-picking” and “badly baled”?

A. Well, only in this letter he said that the 1947 crop did not meet the requirements of the contract as to grade, quality, character and condition and, therefore, cannot be accepted.

Q. He mentioned specifically dirty-picking and badly baled and so on. Did he have any comment

(Testimony of Kilian W. Smith.)

to make—did he ever mention [38] anything else specifically besides those two things?

A. Mainly that Mr. Loewi did not like the hops.

Q. What about the first 100 bales that you had on contract with Seavey? What happened to those?

A. Well, I offered to settle with Mr. Seavey—I had an open-end contract with him, too, and I selected 90 cents as a basis for settlement. Of course, Mr. Seavey hadn't these hops sold yet and he tried to put me off. I had given him a written letter that I was selecting that price and he kept putting me off, so finally I told him I had better weigh them out so Paulus can get his 59 bales and he said they would do that, and he was just stringing along. He was our former boss and we always had friendly relations, so I trusted him to do that, so he did that. He sent Mr. Hinckle down to inspect them and he went through 110 bales of them and he set out ten of these bales and said he thought they were a little boardy or probably contained a little too much moisture.

A few days after that, or, I think, the next day, Mr. Byers from Paulus' office came down to the warehouse to weigh in these 59 bales, and he did not even comment on the fact that 10 bales may have contained some extra moisture. He took the whole works without any question.

Q. You say he took the whole works. Did they weigh in your fuggles, the 50 bales of fuggles over

(Testimony of Kilian W. Smith.)

and above the Seavey contract? Did Paulus accept those for Loewi? [39]           A. Yes.

Q. State whether or not you have ever been paid for the fuggles which they accepted under the fuggles contract?

A. Well, they gave me a check for them after they went through the lates, but they deducted the advances that they had made me on the late crop.

Q. I will hand you Exhibit No. 9 and ask you if that is the check which they gave you with respect to the fuggles contract?

A. This is dated October 25th and made out in my name, in the sum of \$3,497.26, and it says, "Balance on contract delivery 59 bales fuggles," and signed by James A. Byers.

Q. Would you hold the check for a moment and take a look at Exhibit 33-C, the hop purchase invoice, and tell us how that amount was arrived at, apparently arrived at, the amount of that check?

A. This is a hop purchase invoice, dated October 25th. Name: Kilian W. Smith; hops delivered at Oregon Electric Warehouse, Salem; 59 bales gross weight, 11,281 pounds; net without burlap, 10,986 pounds. Grade analysis: Leaf and stem, seven percent; seeds over six percent.

10,986 pounds at 91 cents per pound, \$9,997.26.

Less advances, \$6,500; net settlement, \$3,497.26.

Q. When that computation was made, "Less advances to grower, \$6,500," did that include both the advances on fuggles and the advances on clusters?

(Testimony of Kilian W. Smith.)

A. Yes, that included the \$3,000 advanced on clusters and \$3,500 advanced on the fuggles.

Q. Did you ever cash that check that was handed to you?

A. No. I took it over to the bank and talked to my banker and I told him I was not satisfied with the deal that I had gotten and he advised me, he says, "Don't be a fool. Don't endorse it."

He said, "I would see an attorney, if I were you," and he selected several names and finally I went up to get in touch with Mr. Shields.

Q. Was that check returned to Paulus?

A. Yes, Mr. Shields returned it.

Q. Would you state the circumstances under which some representative of Hugo V. Loewi, Inc., first handed you that check?

A. That was after we had weighed in the fuggle hops. We went up to Mr. Paulus' office and Mr. Byers prepared these and handed them over to me there in the office.

Q. Was there any discussion as to whether or not you agreed to their deducting the cluster advances from the fuggles price?

A. Mr. Paulus was out at that time and Mr. Byers said that was all he had authority to do. I said, "Well, I don't like it," but I took it.

Q. Getting back to the time that the clusters had been weighed in, you mentioned that they took tryings of each bale; did that in the usual manner and took tenth-bale samples? [41]

A. Yes.



(Testimony of Kilian W. Smith.)

Q. And weighed them in? A. Yes.

Q. Did they put the usual marking, the number of the lot?

A. They numbered them from 1 to 73.

Q. That was Mr. Paulus' numbering, was it?

A. Yes. Were you speaking of the fuggles or lates?

Q. Talking about the clusters.

A. Yes. That was 1 to 73.

Q. Did they also have the state inspection number on the bales? A. Yes.

Q. Did they have the grower's number?

A. Yes.

Q. Did they have the warehouse number, or did you notice?

A. I don't recall. I think the warehouse goes by the grower's number.

Q. Did you have any discussion subsequently with respect to the warehouse receipt for the fuggles crop? Do you recall that transaction?

A. The warehouse receipt?

Q. Yes. Do you recall the warehouse making a demand on you for delivery of that receipt? Maybe you would not recall that. It was probably handled by an attorney.

A. Yes, I think I did get a letter from them. There was something about the receipt was not turned in. I think Mr. Seavey [42] or Mr. Paulus had not asked me for the warehouse receipt, and

(Testimony of Kilian W. Smith.)

that is usually turned back to the warehouse, so they wrote me and asked me for them.

Q. I think the correspondence will speak for itself. It is in evidence. Have these clusters ever been resold?      A. No.

Q. Where are they at present, at the present time?

A. In the Oregon Electric Warehouse at Salem.

Q. Have they been there ever since they were delivered, subsequent to the baling?      A. Yes.

Q. Have you ever been paid for the cluster crop at all?      A. No.

Q. Did you recently obtain samples of these cluster hops from the Oregon Electric Warehouse?

A. Yes. On advice from you fellows, I went down there Tuesday night and took tenth-bale samples from Bales 10, 20, and so on, right next to where they had been punched before, and took them right next to the spot where they had taken their inspection samples.

Q. So that these samples were taken out of the same bales that Paulus had taken his inspection samples?

A. The same bale and the same place.

Q. Are these the samples you brought into the courtroom here?      A. Yes. [43]

Q. Are those marked with the bale number corresponding to the bale they came out of?

A. Yes.

(Testimony of Kilian W. Smith.)

Q. In your opinion, would you say that your 1947 crop of cluster hops was of merchantable quality?      A. Yes.

Q. How did they compare with the average of the 1947 cluster hops grown in the Willamette Valley?

A. Well, they were better than average in lupulin content, the brewing value that was in them.

Q. Would you say that the mildew that appears on them was of such character that it affected the lupulin inside the cone?      A. No.

Q. What is your understanding of the meaning of the term "prime quality" in the hop business, in the hop trade generally?

A. To my understanding it means prime grade for the year that the hop was grown; that is, average of the crop for the crop year.

Q. Would you say that is the meaning of the definition, that a prime hop has to be merchantable quality?      A. Yes.

Q. Are you prepared to state that a prime hop is a merchantable hop for the year grown?

A. Yes.

Q. Is that the meaning in the hop trade generally, as far as [44] you are aware?

A. Well, I didn't do any selling to the brewers or to the trade. I was mostly an inspector and buyer for Mr. Seavey. During the war years there wasn't much question about it. I bought some hops that,

(Testimony of Kilian W. Smith.)

personally, I thought were junk, trash, but they went at the full market price.

Q. How did your hops, the 1947 cluster crop, compare with hops that had been taken under similar contracts in prior years?

A. Well, I felt that they were equal to or better than a good many I had taken in.

Q. What has been your experience in the hop business during the time you have been familiar with it with respect to whether or not hop quality is of any great importance at a time when hops are in short supply?

A. Usually when hops are in short supply the price is high, and quality does not enter into it. As prices go down, they usually find some basis for rejection.

Mr. Kester: I think you may inquire.

### Cross-Examination

By Mr. Kerr:

Q. I note in the contract for clusters, Defendant's Exhibit No. 1, the acreage is specified to be ten acres?

A. Yes.

Q. How do you account for the discrepancy between that ten acres and your statement on the witness stand that you had seven and a [45] half acres?

A. The hops are planted on a ten-acre field, and I will grant you actually there is seven and a half acres. In other words, it is an irregular field, and

(Testimony of Kilian W. Smith.)

there is turning ground that we allow on the outside of the plantings themselves, so it is actually a ten-acre field and contains seven and half acres of hops.

Mr. Kester: Is there any issue raised as to whether or not the contract was complied with in that respect? There has been no issue up to this time, and I would like to know whether there is any contention made on that.

Mr. Kerr: It depends on what the facts are; the same estimate of production on ten acres and on seven and a half acres, and we would like to know which is the fact.

The Witness: I think the sales slip will show seven and one-half acres.

Q. (By Mr. Kerr): So that seven and a half acres was the whole amount of clusters?

A. Yes.

Q. You refer to an average of seven and one-half or seven bales per acre of cluster production, is that right?      A. Yes.

Q. That was over how many years?

A. Three years.

Q. What did your 1947 crop of clusters turn out on a per-acre [46] basis?

A. We picked 73 bales.

Q. On the basis of ten acres that would be seven and one-half, approximately seven and a half bales per acre. When you said your estimate was seven bales per acre—when you said “per acre” you



(Testimony of Kilian W. Smith.)

meant per acre of land. Was that on the basis of ten acres or seven and a half, or what?

A. Oh, that was—I haven't worked it out down to fractions. It is an estimate.

Q. Is it true in 1947 you harvested and baled a larger per-acre crop than was the average during the previous three years? A. Yes.

Q. In view of the mildew attack that you have described, how do you account for that larger-than-normal crop, harvested and baled, harvested-and-baled production in 1947?

A. Well, this was the third year of the yard's production and it was coming into full maturity. In other words, with a baby crop you don't get very many hops and the next year there is usually a lot of replanting, due to the babes dying out, and on the third year you will get your best production.

Q. Did you harvest and bale your entire production of 1947 cluster hops? A. No.

Q. What proportion did you not harvest?

A. I would say approximately 25 percent. [47]

Q. So that your total production, part of which you did not harvest, exceeded seven and a half bales per acre by approximately 25 percent, is that right?

A. Well, I could have picked probably 25 or 30 bales more, but we left them hanging on the vines.

Q. Did you cut down the vines that had infected hops? A. We cut them down after picking.

Q. After picking? A. Yes.

Q. Not before picking?

(Testimony of Kilian W. Smith.)

A. No, the pickers just skipped those that were real badly infected.

Q. Did they skip those that were not real badly infected? A. No.

Q. In other words, the pickers picked infected hops, is that right?

A. We skipped some branches and some arms that showed some infection. They picked a certain amount of infected hops along with the good hops.

Q. Would you call that selective picking?

A. To a certain extent.

Q. Did you instruct the pickers to pick selectively?

A. Yes, I told them to let the worst ones hang.

Q. Did you pay a higher rate for picking than the general wage for picking in your area at the time? [48]

A. No. At that time there was considerable bidding for pickers, and most of the yards in the valley were paying five cents at that time.

Q. Did you cut down any of the vines, that is, pull them down, vines that had been affected by mold or mildew, ahead of picking?

A. Ahead of picking?

Q. Yes. A. No.

Q. Would it refresh your memory, Mr. Smith, if I referred to your deposition in this case? May I read a question and answer which is up here on Page 20:

“Q. Did you cut down any of your vines, pull

(Testimony of Kilian W. Smith.)

them down, that had been affected by mold or mildew?      A. You mean ahead of the picking?

“Q. Yes.      A. No.”

I misread the deposition. So, you did not cut any of the vines down ahead of picking?

A. They were cut down later.

Q. After the picking had been completed?

A. Yes.

Q. Is it not a fact that the 1947 attack of mildew in your yard was the first time in your experience that mildew had hit a hopyard at that particular stage of development?

A. No, I had seen it prior to that time. [49]

Q. Specifically, when?

A. I believe in 1944. Mr. Seavey had it in his hopyard, his home hopyard.

Q. And what was the state of development of your yard at the time mildew hit it that year?

A. It showed on the cones similarly to the 1947 crop.

Q. Was that, at that time, general over the Willamette Valley?      A. No.

Q. In 1947 was that type of attack of mildew which affected the development of cones general over the Willamette Valley?

A. How do you mean?

Q. Well, let's put it this way, Mr. Smith: Do you know whether or not other yards in the Willamette Valley were hit by the downy mildew in 1947 at about the same time your yard was hit?

(Testimony of Kilian W. Smith.)

A. Yes, there were other yards hit the same time.

Q. Were those yards in about the same stage of development that your yard was then?

A. There might have been a little variation; some yards will ripen maybe a week ahead of another yard.

Q. Would you care to generalize at all as to the situation in the Willamette Valley that year, as you knew it?

A. Well, I made a number of visits to different hopyards in the valley for the purpose of getting an average in my own mind and to try and compare my yard with others, and I saw others that showed a great deal more mildew damage and some that showed [50] less.

Q. Did you see many yards in the Willamette Valley that year where the cones had been hit by mildew just as those were in your hopyard?

A. Yes.

Q. Could you tell whether or not, generally, in the Willamette Valley, others had been hit with respect to the cones as yours were hit?

A. Generally, most of the yards I saw were hit.

Q. In about the same way that your yard was hit? Is that right?

A. Yes.

Q. Which type of hops did you leave on the vines, fuggles or clusters?

A. We left clusters.

Q. And none of the fuggles, is that right?

A. No.

(Testimony of Kilian W. Smith.)

Q. You harvested your entire fuggle crop?

A. That is right.

Q. Your harvest came earlier in 1947 than in previous years, did it not?

A. Yes; that is, my fuggle harvest did; it came earlier. The late harvest was about the same.

Q. The first time Mr. Fry came out to your yard was what date?

A. I don't recall the date exactly. I think it was around the middle of August. [51]

Q. About August 15th, approximately?

A. Approximately.

Q. That was before the contract was signed?

A. Of course, yes.

Q. What was the stage or extent of the mildew infestation in your cluster yard at that time?

A. They had been hit at that time.

Q. Would you say it was a heavy attack at that time or a light attack?

A. I would say it was not a real light attack. It wasn't as heavy as most of the yards I had seen that year that I compared mine with.

Q. Is there any descriptive term you can apply to indicate to the Court how badly affected by mildew your cluster yard was on August 15th when you say Mr. Fry visited the yard?

A. It was about the same then as it was at picking time, because the hops were developed then.

Q. In other words, the mildew infestation did not get any worse after August 15th? A. No.



(Testimony of Kilian W. Smith.)

Q. What was the stage of development of the hop burrs at that time? Were they fully developed?

A. Most of the hop burrs were fully developed at that time. They were still a little tender; they had not fully matured.

Q. I believe in your deposition you stated it was a light [52] attack at the time Mr. Fry came out to your yard about August 15th. Would you say that is correct?

A. I never did say it was a heavy attack.

Q. Would you say now it was a light attack?

A. Yes.

Q. And you believed it was still a light attack at the time of harvesting? A. Yes.

Q. The contract, which is Exhibit No. 1, placed an estimate of 10,000 pounds (50 bales) upon your cluster crop of hops in 1947. Was that your estimate?

A. That was the figure that we mutually agreed upon. It was conservative.

Q. Was that your estimate?

A. It was not exactly my estimate. It was just the amount that we arrived at to put on the contract.

Q. What was your estimate?

A. I estimated we would get around 100 bales.

Q. 100 bales? A. Yes.

Q. 100 bales, that would be 20,000 pounds, would it not? A. Yes.

(Testimony of Kilian W. Smith.)

Q. In other words, your estimate was just twice the estimate specified in the contract, is that right?

A. Yes. [53]

Q. How do you explain the difference between your estimate of 20,000 pounds and the estimate of 10,000 pounds in the contract?

A. We usually try to be conservative in writing a contract. I did, in the days I was writing contracts; we very seldom would write a contract for more than five bales per acre, because that is the general average for the State of Oregon; was no argument about that.

Q. You actually had a very heavy set of hops on your cluster vines at that time? A. Yes.

Q. Heavier than a normal set? A. Yes.

Q. Was your estimate of 20,000 pounds an estimate of all the hops that could have been harvested from your yard? A. Yes.

Q. Including the blighted hops? A. Yes.

Q. Was the estimate that was agreed upon of 10,000 pounds an estimate of the prime quality hops that could be harvested from your yard?

A. There was no basis laid for the estimate.

Q. What I am trying to get at, Mr. Smith, is why you estimated 20,000 pounds of hops, blighted and otherwise, about August 15th, and your contract says 10,000 pounds. Was the 10,000-pound estimate at that time just an estimate of the prime quality hops? [54]

(Testimony of Kilian W. Smith.)

A. No, not that I know of. We just mutually agreed upon that figure.

Q. Did you suggest the figure of 10,000 pounds to Mr. Fry?      A. Yes.

Q. Is it customary to underestimate by 50 per cent in a term contract for the production of the yard?

A. It is usually customary to underestimate so you are sure you can at least deliver the full amount. I know some fellows, when I was writing contracts, would overestimate for the purpose of getting heavier advances than they really required.

(Recess.) [55]

Q. (By Mr. Kerr): Mr. Smith, in the estimate of 10,000 pounds of hops set forth in the term contract, Plaintiff's Exhibit 1, did you intend to cover the blighted or mildew-infected hops as well as sound hops?

A. Well, we intended—we used it as an estimate, and I agreed in the contract for 10,000 pounds or the entire crop. I just wanted to be sure that they would take all the hops. In other words, if I would get out of them 50 bales, why, that is all they would have to take.

Q. Did you intend the 10,000 pounds to cover whatever you might harvest in and bale?

A. Well, it was just merely an estimate to base the advances on.

Q. As a matter of fact, the 10,000 pounds was

(Testimony of Kilian W. Smith.)

intended as an estimate of the prime quality hops that would come off of that yard that year; isn't that right?      A. Well, I wouldn't say that exactly.

Q. Then what was it to cover?

A. What was what?

Q. What was the 10,000-pound estimate supposed to include?

A. Well, it was a basis for arriving at picking advances and to get somewhere close to letting him know how many we would have.

Q. That was intended, was it not, as the estimate by the two of you of the quantity of hops that would come up to the contract quality which would come off that yard? Isn't that what it was intended as?

A. That was not even mentioned. After all, Mr. Fry knew that there was both good hops and blighted hops there.

Q. Did you intend or expect that the buyer would take both the good and blighted hops?

A. Absolutely. He saw them.

Q. Whatever came off the yard, whatever you saw fit to harvest from that yard, the buyer was to take; is that your understanding of the contract?

A. Well, he looked at them.

Q. He looked at them, and he was to take whatever came off the yard and was baled; is that your understanding?      A. Yes.

Q. I see. Even though the baled hops might be blighted?

(Testimony of Kilian W. Smith.)

A. And he knew they actually were, some of them.

Q. And even though they might be slack-dried?

A. No.

Q. Why not, if those were the hops that came off the yard and those were the hops you tendered to the buyer under the contract? I thought you stated those were to be the hops covered by the contract.

A. Well, I know that our slack-dried, you would expect to have them rejected or you expect to put them up in good shape so that they can use them.

Q. Now why did you expect the buyer under your contract to take mildew-infected or blighted hops and not take the slack-dried hops? [57]

A. I didn't quite get that.

Q. You didn't expect the buyer under this contract to take under the contract slack-dried hops, did you? A. No.

Q. Then why did you expect the buyer to take hops that were blighted or affected by mildew?

A. Well, because I gave him every chance in the world to look at them. I showed them to him and he inspected them and looked at them, and knowing that he was buying them to supply Mr. Oppenheim.

Q. Did you think that the buyer could tell what he was buying when the hops were merely on the vine?

A. I should say so, because they were already formed. The hops were there.

Q. Is it your contention that—



(Testimony of Kilian W. Smith.)

Mr. Kester: Just a minute. I don't think the matter of what the witness contends any buyer could tell is material. Let's stick to the facts.

The Court: Go right ahead.

Mr. Kerr: What was the last question?

(Last question read.)

Mr. Kerr: Strike that.

Q. You have been a hop buyer, I believe you stated, for Mr. Seavey? A. Yes. [58]

Q. And when you were a hop buyer for Mr. Seavey did you go out and buy for Mr. Seavey on term contracts hops which were on the vines and take delivery of those hops while they were on the vines? A. No.

Q. Why not?

A. Because they had to be in the bale before you could accept them.

Q. Is it customary among dealers, as you understand the customs as a result of your experience, among dealers, buyers, agents of buyers or agents of dealers, to buy hops merely upon the basis of how they appear on the vine at the time the term contract is made?

A. I have seen hops on the vine that were so badly damaged by mold that they were actually black, and sticky with honeydew, and at that time, why, we would advise them to leave those out.

Q. But what if the grower did not leave them out, but harvested and baled those hops, and tendered them to you as a buyer, were those covered

(Testimony of Kilian W. Smith.)

by the contract, and was a dealer in the custom of the trade required to accept those because he saw those black hops on the vine?

A. Well, that depended a lot on the market. We took in some stuff that was pretty doggone black, just because the market was really short.

Q. Did you reject any, to your knowledge? [59]

A. I didn't reject any hops that I took in myself for Mr. Seavey.

Q. Do you know whether your employer did during those years? A. Yes.

Q. By reason of what?

A. Well, he rejected some of mine because they were slack-dried.

Q. Did he reject any hops which you had contracted for in his behalf?

A. I can't recall any specific example.

Q. At the time the sales slip that you referred to was made out did you deliver any hops to Mr. Fry at that time? A. No.

Q. Were any of the hops baled at that time?

A. Some of the fuggles were.

Q. Were any of the clusters baled?

A. No.

Q. Were the clusters harvested?

A. What?

Q. Were any of the clusters harvested at that time? A. None of mine.

Q. As a matter of fact, the so-called sales slip which you referred to was intended as a memoran-

(Testimony of Kilian W. Smith.)

dum of the terms of the contract later to be drawn and signed; isn't that the case?

A. No; I used those myself in buying hops, and we used to hand the customer a dollar and sign him up on a slip like that after [60] his hops were picked and baled.

Q. Was that on a spot sale or a term contract?

A. Spot sale.

Q. Spot sale. And it was quite a different matter from the case here involved, wasn't it?

A. Somewhat different.

Q. Quite different, is it not?

A. That is probably a matter of opinion.

Q. You believe that there is only a slight difference between a term or future contract for the purchase of hops and a spot purchase of hops?

A. Yes, on a term basis there is a difference.

Q. As a matter of fact, a contract for future delivery is made before the baled hops are even in existence; isn't that the case?

A. Well, I don't recall of ever making any contracts when the hops were actually developing on the vines. I usually wait a week or so and then just buy them right out.

Q. When you wait a week or so and buy them right out and buy them in the bale, that is a spot purchase, isn't it?

A. Well, we have signed up agreements that were not contracts that would call for the delivery of hops when they were picked and baled. It wasn't

(Testimony of Kilian W. Smith.)

a contract form. It was different than that. We used both forms.

Q. Did you use this form of sales slip for that purpose?

A. We used that for spot purchases. [61]

Q. Yes. The sales slip is designed for spot purchases? A. Yes.

Q. When it refers to the sample delivery, that refers to the sample on the basis of which the spot purchase is made, does it not?

A. That is what it refers to.

Q. And you delivered no sample to Mr. Fry at the time this sales slip was signed?

A. I delivered no sample, but I had let him inspect the hops; in fact, I insisted that he inspect them.

Q. But no sample of baled hops out of your yard in 1947 was delivered by you to Mr. Fry at that time? A. No.

Q. Or anyone else acting for Hugo V. Loewi, Inc.? A. No.

Q. At the time that the sales slip was signed by you, or on that occasion, you say Mr. Fry went out into the cluster yard with you?

A. No, he went out prior to that, a few days earlier.

Q. Oh, that was a few days before that; is that right? A. Yes.

Q. Were you with him then? A. Yes.

Q. Did he go out into the cluster yard when he was there to give you the so-called sales slip? [62]

(Testimony of Kilian W. Smith.)

A. No.

Q. Neither one of you went to the cluster yard at that time, is that right?

A. At the time he gave me the sales slip?

Q. That is right. A. Not that I recall.

Q. Now, will you relate to the Court exactly the conversation between you and Mr. Fry so far as you can remember it now at the time that you and Mr. Fry first went out into the cluster yard in 1947?

A. Well, he stated he wanted to buy hops, and I says, "Well, let's go out and look at them." I says, "I have got some mildew." And he says, "Well, I know; they are infected all up and down the Valley. I have been running around looking at hopyards during the past week with Mr. Oppenheim." I says, "Well, you better come back and take a look at mine, then, and get an idea that you can talk to him about and tell him what they are like." And he didn't want to go back, and I insisted because I wanted him to know what he was buying. So he did. We walked back there, and I purposely took him through. We crossed and crisscrossed all through the yard.

Q. Did Mr. Fry at that time warn you about the inclusion of blighted hops in the harvesting of your hops?

A. No, he didn't even want to look at them.

Q. I will repeat the question so I am sure you understand it. [63] Did Mr. Fry warn you about the inclusion of blighted hops? A. No.



(Testimony of Kilian W. Smith.)

Q. To refresh your memory—And I believe this time I will read the deposition correctly—the deposition previously taken in this case, on Page 19, reads as follows:

“Question: Did he”—referring to Mr. Fry—“warn you about the inclusion of blighted hops?”

“Answer: Yes.”

Mr. Kester: Just a moment. Will you advise the witness what conversation that refers to.

Mr. Kerr: Let me ask you this: Did Mr. Fry at any time while he was in your cluster yard warn you about the inclusion of blighted hops?

A. Yes. He did when he came out while we were talking.

Q. But that was later than the occasion we have been discussing? A. Yes.

Q. That was about when, Mr. Smith?

A. That was the third day of picking. I wanted him to look over what we had picked, what we had skipped, and to advise me on whether I was doing right or not.

Q. And what was the conversation at that time with respect to the blighted hops?

A. Just “Do the best you can.”

Q. Did he say anything about the price being lower if you picked blighted hops? [64]

A. Well, he stated at that time that there might be a cut because of mildew damage.

(Testimony of Kilian W. Smith.)

Q. Do you recall the language he used?

A. Oh, not exactly. We were discussing the general amount of blight in hopyards of the Valley, and he stated at that time that he didn't see how we could get away from getting some blight in.

Q. Did he discuss with you the matter of selective picking of your clusters in order to avoid the blighted hops?

A. He said to continue to pick them as clean as possible and do the best I could.

Q. Did he say anything about leaving blighted hops unharvested? A. Yes.

Q. What was your discussion along that line?

A. About leaving blighted hops?

Q. Yes.

A. Well, we decided that the pickers would not pick any that were really badly blighted or had a lot of those small nubbins because, after all, they were looking for the big hops, nice clusters, because that is what makes weight in their baskets.

Q. Then at that time—And this, I take it, was the latter part of August; is that right?

A. Yes.

Q. At that time you and Mr. Fry did discuss leaving the blighted hops on the vines; is that right?

A. As many as possible, yes.

Q. Now, when did Mr. Byers first come to your yard?

A. I think on the 19th of August, the 19th or

(Testimony of Kilian W. Smith.)

20th, when he delivered the two contracts for my signature.

Q. And was anything said to him at that time about the mildew attacking your yard?

A. I don't recall any conversation along those lines.

Q. Did he go out in the cluster yard with you?

A. No.

Q. As a matter of fact, he was in very much of a hurry that particular time, was he not? Both of you were? A. Yes.

Q. So he didn't stay very long at your place on that occasion? A. No.

Q. He merely brought out the contract for your signature; is that right?

A. And delivered the advance check on fuggles.

Q. Now, you referred to some advice, Mr. Smith, you say you had from Mr. Fry about going ahead and picking. That was after the contract was signed, was it? A. Yes.

Q. You were not picking when the contract was signed? A. No.

Q. You had not started picking yet?

A. No. [66]

Q. And that was how long before you did start your cluster hops? A. About a week.

Q. A week before harvest what was your estimate, if you made one, of the production of clusters that you would get off of the yard? Was it still 20,000 pounds? A. Yes.

(Testimony of Kilian W. Smith.)

Q. You intended at that time to harvest the full 20,000 pounds in the yard; is that right?

A. No.

Q. What did you intend to harvest?

A. The best part of them, as well as I could.

Q. Was your yard uniformly infected by mildew at that time or was it spotted? Were some parts of the yard infected more heavily than others?

A. It was quite uniform. There were a few hills that were worse than others.

Q. Were there some portions of the yard that were more seriously affected than others?

A. But the degree wasn't very great.

Q. Then this 50 percent, which I understood you to say was the degree of infestation, was that the degree of infestation at this August 31st date when Mr. Fry came out the second time?

A. That was an estimate, my own estimate, of those that were touched with mildew. [67]

Q. Was that 50 percent uniform throughout the yard, or did it not apply so much in some parts of the yard?

A. It was quite uniform.

Q. How many of your clusters had you harvested at the time that you say Mr. Fry advised you to go ahead with your picking?

A. Oh, I would say approximately 20 bales.

Q. About 20 bales. That would be not quite a third of your total harvest of clusters that year; is that right?

A. That is right.

(Testimony of Kilian W. Smith.)

Q. Were they in the bale yet or were they in the kiln?

A. One kiln was dried, and I think we were dumping another one on the floor.

Q. No bales as yet formed? A. No.

Q. Just what was it Mr. Fry said about your going ahead and picking?

A. He said to be sure and pick them as clean as possible and be sure they are dried well. I told him to go up and instruct my drier just exactly how he wanted them dried and to take a look at them on the kiln and instruct him accordingly.

Q. Did he do that? A. Yes.

Q. Do you know whether or not he then warned your drier about the drying of the hops?

A. Yes.

Q. And whether or not he warned you or the drier about including [68] blighted hops in the mix?

A. I don't recall that.

Q. This was about August 31st; is that right?

A. No, I think it was a few days earlier.

Q. A few days before August 31st?

A. Yes.

Q. This was the second visit of Mr. Fry?

A. This was the occasion of him giving me the advance.

Q. Did you ask anyone else from Mr. Paulus' office whether or not you should go ahead and pick your clusters? A. No.

Q. And you didn't ask Mr. Paulus?



(Testimony of Kilian W. Smith.)

A. No.

Q. You didn't ask Mr. Oppenheim?

A. No.

Q. You didn't ask Mr. Byers? A. No.

Q. You asked only Mr. Fry; is that right?

A. Yes.

Q. And he told you to skip as many blighted clusters as you possibly could? A. Yes.

Q. Did you ever see Mr. Paulus at your yard?

A. After the hops were picked.

Q. When was that? [69]

A. Well, that is difficult to recall that exact date.

Q. Well, can you tell approximately how long after the hops were picked Mr. Paulus was at your yard?

A. Oh, it may have been three weeks or six weeks. I don't recall exactly.

Q. And the hops were then in the bale and in the warehouse, were they not? A. Yes.

Q. What was the occasion for his coming out to your yard then?

A. He came out with Mr. Byers. I happened to be in the hopyard covering up a ditch, and he stated that Mr. Oppenheim didn't like my hops.

Q. Just what was the conversation at that time?

A. Well, he stated that Mr. Oppenheim didn't like my hops and was going to reject them. And I says, "Well, if he doesn't like them, why can't we get together on some other basis?" I says, "If he is having an awful time selling them, I am willing

(Testimony of Kilian W. Smith.)

to make a little concession," and I asked him to contact Mr. Oppenheim.

Q. Did Mr. Paulus say that he would?

A. Yes. He said he would try his best to, to see that they would go through.

Q. Did he discuss the quality of your cluster crop at that time? A. Not specifically. [70]

Q. You stated that you were asked to sign the letter which is Exhibit 5, I believe, the letter agreeing to inspect the sampling and weighing of the bales without such constituting an acceptance by the buyer. Who was it who asked you to sign that letter? A. Mr. Fry, I think.

Q. And when was it that he asked you to do that?

A. The day he inspected and sampled the hops.

Q. What was the conversation at that time between you and Mr. Fry with respect to that letter, if you remember?

A. He told me at that time that he had no authority to accept or reject the hops, and that he would have to have this thing signed before he could even go ahead, and he wanted to get the weights.

Q. Now, these were the cluster hops you are talking about? A. Yes.

Q. The fuggle hops had previously been sampled, had they? A. I think they were.

Q. And this conversation took place where?

A. In the Oregon Electric Warehouse.

(Testimony of Kilian W. Smith.)

Q. That is where both the fuggles and the clusters were?      A. Yes.

Q. And had the fuggles been accepted and taken in prior to that time?      A. I don't remember.

Q. Were the clusters then stamped and inspected by Mr. Fry after [71] you signed that letter?      A. Yes.

Q. Was anyone else present at the time that you discussed that letter with Mr. Fry?

A. Mr. Weathers was around there. I don't know if he was there when we were discussing that particular letter or not.

Q. Might it be that he was present within hearing when that letter was discussed?

A. It is possible.

Q. Were the cluster hops sampled and inspected by Mr. Fry immediately after that, immediately after you signed the letter?      A. Yes, sir.

Q. And on the same day?      A. Yes.

Q. Had you previously asked anyone in Mr. Paulus' office or anyone to come down and inspect and take in the clusters?      A. Yes, sir.

Q. When did you make that request?

A. At the time I selected the market price. I wanted him to weigh them as soon as possible. I wanted a settlement.

Q. Was that request made to Mr. Byers?

A. To Mr. Paulus.

Q. That request was made to Mr. Paulus. Was it by telephone or in his office?

(Testimony of Kilian W. Smith.)

A. While I was in his office. [72]

Q. What did Mr. Paulus say?

A. He said he couldn't weigh them until he had authority from Hugo V. Loewi.

Q. Now when did that take place?

A. I think the middle of September.

Q. About the middle of September in Mr. Paulus' office? A. Yes.

Q. You asked Mr. Paulus to send over and have the clusters taken in; is that right? A. Yes.

Q. And Mr. Paulus told you that he couldn't do so until he had authority from Hugo V. Loewi; is that right? A. Yes.

Q. Then did Mr. Paulus communicate with you later about taking in those clusters?

A. About what?

Q. About taking in the clusters?

A. He sent me a letter telling me they were rejected later.

Q. Before you got the letter of rejection you signed this letter agreeing to the inspection of the hops, didn't you? A. Yes.

Q. Did anyone talk to you about the taking in of your hops or, rather, the inspection of your hops before you signed that letter or before you and Mr. Fry discussed that letter?

A. Well, we talked about it. I made several trips up there, [73] and was in quite a hurry to have the hops weighed in.

Q. When was it you talked about it?

(Testimony of Kilian W. Smith.)

A. Well, between the time that I selected my price and the time they were taken in; probably two or three visits to Mr. Paulus' office in that time.

Q. Did Mr. Paulus ever tell you that he had finally been authorized by Hugo V. Loewi to sample, inspect and weigh the hops?

A. Yes. He said under the contract he could do that any time.

Q. When was this?

A. One of the times I was in his office. I don't recall the exact visit.

Q. That was after he had previously told you that he had to get authority from Loewi first?

A. Yes.

Q. And then later he told you that he could go ahead and sample them, inspect them and weigh them; is that right?

A. Yes.

Q. And then it was sometime after that last conversation that Mr. Fry showed you this letter of October 10th which you signed giving permission to inspect; is that right? Is that the sequence of events?

A. I believe——

Q. October 3rd, was it?

A. Yes, it was October 3rd. [74]

Q. October 3rd is the letter which you signed giving authority to inspect; is that right?

A. Yes.

Q. And it was before October 3rd, then, that Mr. Paulus told you he had been authorized to go ahead and inspect the hops?

A. Yes.



(Testimony of Kilian W. Smith.)

Q. When you asked Mr. Paulus to inspect and take in the clusters did you ask for payment for the fuggles? A. I don't recall.

Q. Did you ask anyone for payment for the fuggles? A. I don't recall that.

Q. Do you recall the day that you received a check that you identified as the check tendered to you for the amount of the contract price of the fuggle hops less all advances made? Do you recall that? A. I don't recall the exact date.

Q. Well, do you recall the occasion which led up to the execution of that check?

A. It was after Mr. Byers had received the fuggles, had taken them in and weighed them.

Q. Now, will you tell us about the taking in and weighing of the fuggles by Mr. Byers. When was that? A. I don't recall the exact date.

Q. Do you recall where it was?

A. It was at the Oregon Electric Warehouse.

Q. Isn't it a fact that at that time you asked him to take in the fuggles—You asked him first to take them in, did you not? A. Sure.

Q. Did he say anything to you about payment for them? A. Payment for the fuggles?

Q. For the fuggles, yes.

A. Well, he told me after he had taken them in, yes. He said, "We will go up to the office and settle up after we are through."

Q. Did he at the warehouse tell you that he would have to deduct from the contract price pay-

(Testimony of Kilian W. Smith.)

able on the fuggles all advances made including advances on the clusters?

A. I believe that was mentioned. I think he did talk about that.

Q. He told you that he would have to do that if he took in the fuggles; is that right?

A. Yes. He said he had no authority to take in the lates.

Q. What did you say?

A. Well, I says, "Go ahead and do it, and we will talk about it later."

Q. Did you agree that he would take in the fuggles and then pay for the fuggles less all advances which had been made?

A. He wouldn't have weighed the fuggles. That was the only way I could get them weighed in. I had to get them weighed in to get a settlement with Mr. Seavey on this former 100 bales.

Q. I see. Was it agreeable with you at that time that the fuggle hops be taken in and accepted and weighed and paid for [76] less the amount of all advances that had been made to you both for the fuggles and the clusters?

A. It was not agreeable, but I let him go ahead.

Q. Did you tell him it was all right?

A. I told him to go ahead. I never did agree about it.

Q. But you told him to go ahead on that basis; is that right?      A. Yes.

Q. And it was on that basis, then, that he did weigh and accept and take in the fuggles; is that right?      A. Yes.

(Testimony of Kilian W. Smith.)

Q. And after he had weighed the fuggles both of you went up to Mr. Paulus' office; is that right?

A. That is right.

Q. And Mr. Byers in Paulus' office at that time made out this check which is Exhibit 9 for \$3,497.26; is that right?

A. Yes.

Q. Did he tell you at that time how the amount of this check was arrived at?

A. He handed me a statement with the figures on it.

Q. Is that statement this hop purchase invoice dated October 25th which is in evidence as Exhibit 33-C?

A. Yes.

Q. And he handed that to you along with the check for the fuggle price less the advances; is that right?

A. Yes. [77]

Q. There was no dispute between you at that time, was there, or no question as to the amount that had been advanced to you for the fuggles and the clusters; is that right?

A. No dispute as to what?

Q. There was no question about how much you had received in advances?

A. No.

Q. You have mentioned some hops which I believe you said you had sold or contracted to Mr. Seavey. Is that the Seavey Hop Company or Mr. Seavey personally?

A. The Seavey Hop Company.

Q. Those were fuggles from the same yard as the fuggles which were taken in by the defendant in this case; is that right?

A. Yes, sir.

(Testimony of Kilian W. Smith.)

Q. Did the Seavey Hop Company take delivery of those fuggles?      A. Yes.

Q. When?

A. He weighed them prior to the date that Mr. Byers took in the 59 bales, and he paid me for them December 31st.

Q. At what price did he take them in? The contract price or some lesser price?

A. He took them in at a lesser price.

Q. Why?

A. Because Mr. Seavey had not had them sold, and I wanted to settle before the end of the year due to income tax purposes. [78] If they had gone over to the next year, why, I would have had a terrific income tax in one year.

Q. What was the contract price?

A. 91 cents.

Q. What price did he pay you?      A. 75.

Q. That was the only reason for your reselling the hops to him at a lower price than the contract price?

A. He hadn't had them sold. He contracted them on his own hook. He hadn't had them sold to any other dealer or brewer, and he tried to hold me off until he could place them. And I don't know whether he has got them placed yet. But I told him he bought them and we had to arrive at some settlement, and at that time he figured the market was around 50 cents—or around 60 cents, I believe,

(Testimony of Kilian W. Smith.)

somewhere in that neighborhood, and we agreed to meet him halfway.

Q. Were those hops mildew damaged?

A. Oh, a very slight touch.

Q. 1947 was not a good hop-producing year in the Willamette Valley, was it? A. No.

Q. It was not a good year for hops in your own yard?

A. Well, I figured the hops were richer except for mildew.

Q. Except for mildew?

A. They had nicer, bigger berries, and there was more lupulin [79] in them.

Q. Have you ever sold hops to a dealer on the basis of the amount of lupulin in the hops?

A. They have been sold that way, I understand.

Q. Have you ever sold them, Mr. Smith?

A. On the basis of lupulin?

Q. Of lupulin.

A. That is always taken into consideration. When a hop is being bought the buyer inspects them; he breaks open the sample and sees how rich it is. If it has got a lot of lupulin they say it is a fat hop.

Q. How does a buyer determine the lupulin content when he breaks open the sample and looks at it?

A. The buyer usually does it by visual inspection.

Q. What does he take into consideration on that visual inspection?



(Testimony of Kilian W. Smith.)

A. He takes into consideration the amount of lupulin that is in the hop.

Q. How does he determine the amount of lupulin in the hop?      A. I said by a visual inspection.

Q. That is, he looks for the lupulin itself?

A. Sure. He looks at it and feels.

Q. As a matter of fact, he judges the probable lupulin content by the appearance of the hop, does he not, the color?

A. No, he breaks the hop open to find the lupulin. That is under the petals.

Q. He breaks an individual cone, then, and feels it for lupulin; [80] is that right?

A. Takes an individual cone and breaks it in two so he can see the bases of the petals where the lupulin is.

Q. Is that the only visual inspection that the buyer makes of the sample?

A. No, he makes a lot of them.

Q. What are those others?

A. Oh, turns them all around and looks at them on the side cuts.

Q. What is he looking for?

A. He is looking for—he can tell on the side cut the amount of lupulin, and can smell it. He will turn it around and break it in two and examine it. He will take a handful and rub them in his hands and smell them for aroma. He will look for mold and he will look for——

(Testimony of Kilian W. Smith.)

Q. Downy mildew damage? A. Yes.

Q. Look for nubbins?

A. He probably would if they were there.

Q. When you were buying hops for Mr. Seavey, did you look for downy mildew damage in the samples?

A. I looked at them quite closely. There usually wasn't any downy mildew when I was buying except for the one crop that I stated that I saw.

Q. But you looked for it, didn't you?

A. We looked for everything. We looked for red spider; we looked [81] for mold; we looked for leaves and stems, and how it was put up, how much spring it had.

Q. You stated that your 1947 clusters were of merchantable quality. Did you mean by that that they were salable? A. I absolutely did.

Q. You consider any hop which is salable as a prime quality hop?

A. Any hop that has preservative value; that is, that has the stuff in it that it is required for. In my case these hops had a lot of lupulin in them. In fact, my analysis showed that they were above the average for the state.

Q. Mr. Smith, say that I as a buyer of hops buy to shake the lupulin out of them, just to get the lupulin from the hops, and I purchased a quantity of hops that was badly blighted, very poor color, brown because of blight, which ordinarily would not sell to brewers or for the brewing trade, but did

(Testimony of Kilian W. Smith.)

sell to me because I wanted them for the lupulin, would you say that because I bought them they were prime quality hops?

Mr. Kester: I don't know that that is a question possible to answer, your Honor. It is completely speculative.

The Court: Oh, this is his principal antagonist, so I will not try to shorten the examination. Answer if you can.

A. I don't think I can answer that.

Q. (By Mr. Kerr): Your definition of a prime quality hop is any hop which is of merchantable quality; is that right? [82] A. Yes.

Q. And it makes no difference how it looks?

A. Well, that has something to do with its merchantable quality.

Q. What does the appearance of the hop have to do with its merchantable quality?

A. Well, it has got to be a good, rich hop; it should be developed; should have——

Q. Just a minute. What do you mean by “developed?” A. It should be mature.

Q. Would you say fully matured?

A. Yes.

Q. And what else with respect to appearance?

A. It should have a silky, oily feeling.

Q. Would you say it should be of good color?

A. To be marketable?

Q. Of merchantable quality? A. Yes.

Q. And what is a good color?

(Testimony of Kilian W. Smith.)

A. An average color.

Q. An average color. An average of what?

A. Well, an average for the season.

Q. Where?

A. In the area or the state grown.

Q. For instance, take your hops. What area determines whether or not your hops are prime quality? [83]

A. The Willamette Valley.

Q. The entire Willamette Valley? A. Yes.

Q. Who determines what the average appearance of hops produced in the Willamette Valley is for a particular year? A. The hops themselves.

Q. Who looks at the hops, all of them or most of them, in the Willamette Valley and determines what the average appearance is?

A. All of the people and growers in the trade.

Q. Did you look at them all?

A. Not all of them.

Q. How many of the 1947 Willamette Valley crop of clusters did you look at personally?

A. A great many.

Q. How many?

A. Possibly 20 or 30 yards. I made several trips all day with Mr. Seavey.

Q. These were trips to the yards while the hops were hanging on the vines; is that right?

A. While they were hanging on the vines and while they were being picked.

Q. Did you see those hops later in the bales?

A. Yes.

(Testimony of Kilian W. Smith.)

Q. Would you say that you saw a great many of the Willamette Valley 1947 cluster hops in the bales? [84]

A. Yes, yes; in the bales.

Q. And in determining whether or not your hops were prime quality, then, you take into consideration the color of all of these other hops; is that right?

A. Right.

Q. Where did you see all these others hops in the bales?

A. At the Oregon Electric Warehouse, at the Donald Warehouse, and at Schwab's Warehouse at Mt. Angel.

Q. You looked at samples of them, did you?

A. I saw a great many samples. I visited all of these warehouses, because that had been my job previously. I was still interested in it, in keeping up. I saw a lot of hops taken in on job contracts that were a lot worse than mine.

Q. And on the basis of your viewing of these samples of Willamette Valley cluster hops in '47 you judged your own hops as to whether or not they were prime quality; is that right?

A. Yes, and I had other people look at them, too.

Q. Now, what, other than color, determines whether or not the hop is of merchantable quality?

A. Well, in my mind the laboratory analysis has the biggest thing to do with it, because most of these—or a lot of these brewers sent them to



(Testimony of Kilian W. Smith.)

laboratories to be analyzed for their resins and their preservative qualities.

Q. Do you know that of your own knowledge?

A. Please?

Q. Do you know that of your own knowledge?

A. Yes.

Q. Do you know how many brewers in the United States do that? A. No.

Q. Does your contract with Hugo V. Loewi on the cluster hops for 1947 say anything about a chemical analysis? A. No.

Q. All right. What other factor determines whether or not the hops are of merchantable quality? What about sound condition? Must they be in sound condition? A. Yes.

Q. What does that mean?

A. Well, they should be well packed.

Q. Would you say uniformly packed?

A. Yes.

Q. Are you familiar with the term "false-packing?"

A. The first time I had heard it was in this courtroom, or these depositions.

Q. In your experience does it sometimes occur that the hops in a bale will not be thoroughly mixed and therefore would not be of uniform type, quality or condition? Does that sometimes happen?

A. It could happen at times. Most probably—Most often it happens when hops are moldy, because if the picking season stretches out for quite

(Testimony of Kilian W. Smith.)

a length of time, why, as these spores are in the hops they keep on dying and the hops become blacker, [86] more moldy, and you will see a variation in a condition like that. Normally you see very little variation.

Q. Does it sometimes occur when the hops are not thoroughly mixed that hops that are a different color from others are localized within a certain part of the bale?

A. Well, hops are usually thoroughly mixed when they are put on a kiln.

Q. They should be, at least, should they not?

A. They are dumped out of a sack, and then when they are dumped off into the cleaning room or storeroom, why, they are scooped out of there and just dumped in a big pile and rolled down. I don't see how you could mix them better with a paddle.

Q. They should be, in any event, thoroughly mixed before they go in the bale? A. Yes.

Q. Now, as I understand your definition of prime quality, it is based entirely upon the average?

A. That is my opinion.

Q. For the entire Willamette Valley; is that right? A. That is my opinion.

Q. And you do not take into consideration, then, at all the hops of the quality and condition of hops grown, say, in Grants Pass that year?

A. How do you mean, take into consideration? Will you restate that, please? [87]

Q. Well, you would not compare your hops with

(Testimony of Kilian W. Smith.)

hops grown in the Grants Pass area in order to determine whether or not your hops were prime hops; is that right?

A. It is usually a different type of hop if it comes from a different area.

Q. Well, they are all sold, are they not, as hops, Pacific Coast hops? A. Yes.

Q. They are all clusters, are they not, and have the same type clusters? A. Yes.

Q. Do you compare your hops with cluster hops produced in Eastern Oregon to determine whether or not your hops are prime?

A. Well, there is a different type of hop grown in Eastern Oregon than there is in the Valley.

Q. A different type in that it has no mildew damage, you mean?

A. It is usually a greener color. It is an irrigated hop.

Q. You make no comparison of the hops grown in the two areas in respect to mildew damage; is that right?

A. They usually don't have mildew there.

Q. They usually don't have mildew damage?

A. That is right.

Q. How about the Yakima, Washington, hops?

A. It is the same case there. It is a different hop, different type of hop entirely. [88]

Q. In any event, you would not have any means of knowing——

A. Well, Yakima hops are sold as Yakima hops,

(Testimony of Kilian W. Smith.)

and Oregon hops are sold as Oregon hops. And by "Oregon"—The greatest share of Oregon hops are in the Willamette Valley.

Q. Well, Grants Pass hops are sold as Oregon hops, are they not?

A. They are usually stipulated Grants Pass hops, or California hops.

Q. Stipulated by whom?

A. People that I have talked to in the trade.

Q. As between whom? I mean, between brewer and dealer or dealer and grower?

A. Usually dealer.

Q. Dealer and grower?

A. I would say dealer. I haven't talked to any Grants Pass dealers, to my knowledge.

Q. So you don't know how the Grants Pass hops are sold?

A. I have never been down in the Grants Pass hop area.

Q. You referred to having sold while with Mr. Seavey some junk; is that right?      A. Yes.

Q. In your opinion was that junk prime quality?

A. It was taken under prime quality contracts.

Q. In your opinion was it prime quality?

A. No.

Q. Why not? [89]

A. Because it was badly damaged by mildew or by mold.

Q. Do you contend that the mere fact that a buyer may accept hops under a contract calling for a prime hop makes those hops prime?

(Testimony of Kilian W. Smith.)

A. Does it make them prime?

Q. Yes. In other words, it was junk whether taken under a prime contract or on a spot sale, wasn't it?

A. Yes.

Q. Surely.

A. But it was sold and they made beer out of it.

Q. Do you know anything about the sale of it to the brewer?

A. Of those types of hops?

Q. Yes.

A. Yes, I know they went through.

Q. What year was that?

A. A great part of them in 1944.

Q. Even if Mr. Fry had not told you to pick your clusters, as you contend, you would have picked them all, would you not?

A. No.

Q. Why not?

A. Because I wanted him to have the responsibility. That is why I asked him to come out and make the advance. I didn't want to put my own money into them unless he okehed it.

Q. Isn't it a fact, Mr. Smith, that you on the basis of your experience as a dealer and as a buyer tried to pin Mr. Fry down [90] to a definite commitment to take those hops, and he refused to do it and would not fall into that trap? Isn't that the fact?

A. I wanted him to definitely understand what the hops were like, and I wanted him to definitely take that advice to his principals.

Q. I see. That was your purpose, to inform his



(Testimony of Kilian W. Smith.)

employer, Mr. Paulus, as to what the condition of your hops was; is that right?

A. Yes. I wanted him to know so he could tell me whether he wanted to buy them or not to buy them. I wanted him to tell me that.

Q. Now, of course,—

A. I didn't want him to take something that he couldn't—he felt he didn't want. I wasn't trying to be unreasonable with him. I was giving him all the room in the world.

Q. If you had not talked to Mr. Fry at all or to anyone else representing Mr. Paulus about the condition of your hops or whether or not they should be harvested, would you have gone on and picked them? A. If I hadn't sold them, you mean?

Q. No, if you hadn't talked to anyone about the condition of them?

A. Would I have gone ahead and picked them?

Q. Yes.

A. I don't think I would have at the price we had to pay. [91]

Q. That is to say, even though you had them contracted at this high price you would not have picked them? A. I don't think I would have.

Q. Then why was that?

A. Because it cost a great deal to harvest them. Labor was so high-priced. I was dubious as to the amount of hops that were going to be produced. I felt there was going to be a large crop, and I felt that these fellows made poor estimates, and I didn't want to be caught.

(Testimony of Kilian W. Smith.)

Q. In other words, you felt that you would not be able to harvest a high-quality hop that year; is that right?

A. I didn't want to harvest them unless I felt they were sold.

Q. Well, was it your opinion that they would not be a high-quality hop?

A. It was my opinion that they had mildew, and if that had anything to do with it they can always find something—some basis of rejecting hops when the market slips down. And they definitely had mildew and they knew it.

Q. Mr. Fry didn't tell you that the hops would be accepted, did he?

A. Well, he says he wants hops. He sent me out here to contract them.

Q. At this late-in-August date when you say he told you to go ahead and pick, did he tell you then that the hops would be accepted? [92]

A. He said, "Sure, we want you to pick them." He says, "If you need more money, call us and we will give you some more." He said if I had to go to six or seven cents a pound, why, feel free to ask for more money.

Q. Was it at that time that he warned you about blight?

A. It was at that time he told me to pick them and dry them the best I could.

Q. And to avoid, so far as possible, any blighted hops; is that right?

A. That is right.

(Testimony of Kilian W. Smith.)

Q. And that is the time that you say he told you to pick?

A. Yes; he saw how we had been picking and he saw what had been picked.

Mr. Kerr: That is all, Mr. Smith. Thank you.

Redirect Examination

By Mr. Kester:

Q. Mr. Smith, at the time you made this deal with Mr. Fry and this contract was entered into would you have sold him the fuggles without the clusters going along with it?

A. No, I wanted to sell all the hops to one buyer.

Q. At the time this contract was entered into I believe you stated that the fuggles had already been picked?

A. Yes, at the time the contract was signed.

Q. Did Mr. Fry know that they had already been picked?

A. Well, I think Mr. Byers did, because he was there when—he [93] was waiting at the hop house when the crew was baling the fuggle hops.

Q. At the time they made the first advance—The first one was the \$3500 advance, wasn't it?

A. Yes.

Q. At the time they made that first advance did Loewi's representative know your fuggle crop had already been picked and baled?

A. I don't think he did. He knew after he got out there.

(Testimony of Kilian W. Smith.)

Q. He knew after he got out there and before you got the check that the fuggles had already been picked? A. Yes.

Q. So, did he know that that money was not going into the fuggles but was going into the cluster crop instead?

A. He must have, because I told him that he had already advanced the picking of my fuggles and that I would not need the fuggle money and I would go ahead and use it on the lates.

Q. Did they say that was all right?

A. Sure.

Q. So that all the advances that were made went into the cluster crop and none of it went into the fuggle crop?

A. That is right. The pickers were already paid off.

Q. So in order to get the fuggles they made these advances for the clusters, and then charged those cluster advances back against the fuggle price. Is that the deal? A. Yes. [94]

Q. Would you have put your own money into harvesting the clusters if they had not made those advances? A. No.

Q. Did you ever have any conversation with Mr. Oppenheim during 1947? A. No.

Q. Did you ever meet the gentleman before the occasion here in court? A. No.

Q. Have all your transactions with the firm been

(Testimony of Kilian W. Smith.)

carried on through the office of Mr. Paulus and his employees?      A. Yes.

Mr. Kester: That is all.

Mr. Kerr: That is all.

(Witness excused.)

(Recess.) [95]

H. A. CORNOYER

was thereupon produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. State your name, please.

A. H. A. Cornoyer.

Q. Where do you live, Mr. Cornoyer?

A. Salem.

Q. What is your business?

A. Beg pardon?

Q. What is your business?

A. Hop dealer and broker.

Q. How long have you been engaged in the hop business?      A. Oh, better than forty years.

Q. In and around the vicinity of Salem most of that time?      A. Beg pardon?

Q. Around Salem most of that time?

A. Yes.

Q. Do you represent any particular hop dealers?

A. One.



(Testimony of H. A. Cornoyer.)

Q. Would you state who that is, please?

A. P. F. Bing, Inc., New York.

Q. During your years of experience in the hop business have you represented various hop buyers?

A. Yes, sir.

Q. Would you give us a general idea of the extent of that experience.

A. Oh, Wigan & Richardson of London since 1913.

The Court: What are you going to cover by him?

Mr. Kester: He will testify with respect to the quality of the hops, your Honor.

The Court: These particular hops?

Mr. Kester: Yes, as well as certain matters concerning the trade generally.

The Court: What matters concerning the trade generally?

Mr. Kester: Well, as to the trade meaning of various terms.

The Court: What terms?

Mr. Kester: The quality provisions that we have been talking about.

The Court: You have already covered that by your stipulation. That is one of the things that the stipulation takes care of. He can testify as to the quality of these particular hops.

Mr. Kester: I didn't understand that we were to be precluded from offering evidence——

The Court: Three expert witnesses on a side,

(Testimony of H. A. Cornoyer.)

under the ruling of the Court. You have had three witnesses in the previous case as to what these contracts mean. By stipulation now that testimony has been made a part of the testimony in this case. [97] You see how it works?

Mr. Kester: I confess I didn't understand that applied to the definition of terms as well as to the quality of the hops.

The Court: I don't think we understand each other. Let's start over again. This man can testify as to the quality of these particular hops which we are trying now, Mr. Smith's hops. And two other people can testify to that besides Mr. Smith, the owner. Trade matters which are a matter of expert opinion have already been covered in the other case and that comes into this case. To be specific, you can't put three men on now in this case and three men in the case that follows it to say what "prime quality" means. You have already covered it on each side in the other case. If you put three more men in the case than that, you would have six experts, and then if you put three more in the case to follow you would have nine experts testifying on that point.

Mr. Kester: My only thought, your Honor—I am not arguing——

The Court: Go on and argue. Lots of people argue with me. Sometimes they have good luck.

Mr. Kester: My only thought is the witness may wish to explain what he is talking about as to

(Testimony of H. A. Cornoyer.)

these particular hops. Now, I don't want to transgress the Court's ruling. May he explain what he is talking about with respect to these hops?

The Court: We will get along all right so long as we have [98] the general understanding.

Q. (By Mr. Kester): I think you were telling us about your experience in the hop business, Mr. Cornoyer. You mentioned some of the persons or firms for whom you have been working in the hop business. Would you continue with that, please? You mentioned Wigan & Richardson. Are there any other buyers?

A. And numerous other people.

Q. Numerous others. Have you ever been involved in the grading end of the hop business?

A. Yes, sir.

Mr. Kerr: If your Honor please, we will stipulate as to the qualifications of this gentleman for testing, sampling and grading hops.

Mr. Kester: Very well.

Q. Mr. Cornoyer, have you had an opportunity to examine the seven samples which are here in the courtroom and, I believe, marked Exhibit 35, of the Kilian Smith 1947 cluster hops?

A. I have.

Q. Would you state whether or not, in your opinion, those hops are of the character that they would generally have been accepted under prime quality contracts in prior years in this vicinity?

A. No.

(Testimony of H. A. Cornoyer.)

Q. Would you state whether or not, in your opinion, those would be regarded as merchantable hops?      A. Yes. [99]

Q. Would you describe the hops that you examined in these samples and explain what your opinion is predicated upon.

A. Well, the seven samples showed mildew.

Q. Would you describe the samples generally with respect to the other factors that enter into their appearance.

A. Were it not for the mildew I am of the opinion that they would be primes.

Q. Now, with regard to the mildew that you say appeared on them, did you make observations with respect to whether that mildew was of such a character that it would go into the core of the hop and affect the lupulin content?

A. I didn't find it as such.

Q. You didn't find that it affected the lupulin?

A. No.

Q. Is the matter of mildew as it affects hops usually a matter of the degree to which it appears on the hop?      A. Yes.

Q. If it appears only to the extent that it discolors some of the petals but does not go into the core of the hop, does that affect the lupulin content or quality?

A. I don't know. I am not a chemist.

Q. As it is generally known in the hop business, is it generally regarded that mildew merely on the outer petals of the hop has any effect on the lupulin

(Testimony of H. A. Cornoyer.)

inside? A. Well, I don't quite know. [100]

Q. Your answer is No?

A. No, I don't quite know.

Q. Oh, I see. Pardon me. From your knowledge of the hop business generally and the purpose for which hops are bought and sold, what is the quality of the hop which makes it of use in the brewing of beer?

A. I can't answer that question. I am not a brewmaster.

Q. Do you know from the trade generally what the valuable part of the hop is?

A. The lupulin.

Q. The lupulin. That is what gives the beer its characteristic flavor and aroma? A. Yes.

Q. Now, did you observe the lupulin content of the hops that you examined here in the courtroom?

A. I did.

Q. Did that appear to be of sufficient quantity and quality, as far as you could tell?

A. Yes, that is average. It was.

Q. Would you say that those hops were average for the year 1947? A. Yes.

Q. During the year 1947 were you engaged in the buying and selling of hops in the Salem vicinity?

A. I was.

Q. Could you tell us about how many bales of hops went through [101] your office in that connection, how many you handled?

A. Oh, about 2500.



(Testimony of H. A. Cornoyer.)

Q. Do you know about how many different contracts you had with different growers?

A. I think I had sixteen contracts.

Q. What was your observation of the extent of mildew in the Willamette Valley in 1947?

A. I think the majority of the hops showed mildew or a trace of mildew in '47.

Q. What would you say with respect to the number of yards in the Willamette Valley in Oregon that had some mildew?

A. I didn't visit all the yards.

Q. Well, among those that you saw what would you say?

A. Well, I just said that better than half of them showed mildew or a trace of mildew. I don't know just exactly how many yards. The largest section was Independence. I was familiar with that. I think every yard in Independence showed mildew.

Q. Generally speaking, were the hops from those yards accepted in the trade and bought and sold?

A. Well, I don't know. I think most of them were sold at possibly a reduction.

Q. From your knowledge of the hop business would you say that most of the 1947 cluster crop had been disposed of?

A. You mean sold?

Q. Yes.

A. No, there is probably between six and seven thousand bales in growers' hands at the present time.

Q. What was the production in 1947?

A. Well, around 80,000 bales.

(Testimony of H. A. Cornoyer.)

Q. So that somewhere over 70,000 of those bales have been sold up to this time? A. Yes.

Q. Would you say that out of those 70,000 bales probably the majority had some traces of mildew in them? A. Yes.

Q. Now, is it a fact that the mere presence of a slight trace of mildew on a hop cone automatically makes that hop not a prime hop?

A. That is my understanding.

Q. That the slightest trace of mildew on a hop will prevent it from being a prime quality hop?

A. According to my understanding, yes.

Q. Would it, nevertheless, be bought and sold and used in the manufacture of beer?

A. Yes. The mere fact that some of them are bought or accepted under a prime contract does not necessarily mean that they are prime hops.

Q. Would you say that the mere presence of a slight trace of mildew on a hop would mean that that was not a good, merchantable [103] hop?

A. No, no; it is merchantable.

Q. It could be a good, merchantable hop, even though——

A. It could be a good, merchantable hop.

Q. Even though it had some mildew on it. Did you ultimately take all of the hops that you had contracted? A. All but one crop.

Q. Did you ultimately take that?

A. Yes, I ultimately took that, and I settled with the grower.

Q. And made a reduction in price on that?

(Testimony of H. A. Cornoyer.)

A. Yes.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. I understand, then, that you did reject some of the 1947 crop? A. One crop.

Q. Why did you reject it?

A. On account of mildew.

Q. I believe you stated that these hop samples which you examined are average for the year 1947?

A. Oh, I would say yes.

Q. Average for what, Mr. Cornoyer?

A. What? [104]

Q. An average of what, an average of the crop where? A. In Oregon in 1947.

Q. Did you include Grants Pass in that?

A. Well, I wasn't down to Grants Pass.

Q. By Oregon do you mean the Willamette Valley? A. Yes.

Q. Did the Yakima area, to your knowledge, produce an average crop in '47 that was of a high quality? A. I wasn't in Yakima.

Q. You don't know what they produced?

A. No, I don't know anything about Yakima.

Q. How about California?

A. I don't know anything about California.

Q. Does the mildew damage on hops affect the color of the hops? A. Yes.

Q. How does that color show up in the hops?

A. Well, it is red, has a reddish cast.

(Testimony of H. A. Cornoyer.)

Q. Are hops which are affected by that reddish mildew, reddish color, a good color?

A. Beg pardon?

Q. Is that a good color?

A. No, that is not a good color; that is, not according to my definition of a prime hop.

Q. You believe that your definition of a prime hop is the definition generally applied in the trade?

A. I believe so.

Mr. Kerr: That is all. Thank you.

#### Redirect Examination

By Mr. Kester:

Q. One more thing, Mr. Cornoyer. As I understand it, the only thing wrong with these hops, in your opinion, was that they had some mildew on them; is that correct? A. That is right.

Q. But that mildew was not of such a kind as to affect the lupulin; is that right? A. Yes.

Mr. Kester: That is all.

#### Recross-Examination

By Mr. Kerr:

Q. Was that mildew damage readily apparent upon looking at the hops? A. Beg pardon?

Q. Can you see that mildew damage when you look at the sample? A. Yes.

Mr. Kerr: That is all. [106]

#### Redirect Examination

By Mr. Kester:

Q. One more thing. Is it customary in the hop business to make a separation of a hop sample and

(Testimony of H. A. Cornoyer.)

try to pick out those hop cones which on microscopic examination do not show the slightest trace of mildew from those which show a trace of mildew?

A. Oh, not necessarily. If there is plenty of them in, why, you don't go to all that trouble.

Q. Did you ever hear of a test being made such as Dr. Hoerner testified to here in court the other day?      A. No.

The Court: He said himself none had ever been made before. Call another witness.

(Witness excused.) [107]

#### WILBERT AMAN

was thereupon produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kester:

Q. Would you state your name, please?

A. Wilbert Aman.

Q. Where do you live, Mr. Aman?

A. Mt. Angel.

Q. Are you engaged in the hop business?

A. Yes.

Q. Do you raise hops?      A. Yes.

Q. How large a place do you have?

A. Well, I rent my father's hopyard there. We have fifty-two acres in hops.

Q. Fifty-two acres in hops?      A. Yes.

Q. Do you have both fuggles and clusters?



(Testimony of Wilbert Aman.)

A. Yes.

Q. Were you raising hops in 1947?

A. Yes.

Q. How long have you been in the hop business?

A. Well, I have been engaged in the growing of hops since 1932.

Q. Have you raised hops continuously since that time? [108] A. Yes.

Q. Have you had occasion to be familiar with the hops grown and raised in the Willamette Valley generally during that time?

A. Well, quite a little.

Q. Have you examined other crops and samples of other people's crops during that time?

A. Well, I have some. I have seen hops from that district there and some of these other districts.

Q. Did you have occasion to see Mr. Kilian Smith's hopyard during the growing season of 1947?

A. Yes, I have seen it. Oh, I think it was about somewhere near the middle of August.

Q. Near the middle of August. Do you recall now whether the fuggles had been picked or were they still being picked about that time?

A. Well, they just finished picking the fuggles, I think, that day.

Q. Did you go around and look through the cluster part of the hopyard?

A. Yes, we drove down through the yard, down through the late yard.

(Testimony of Wilbert Aman.)

Q. Did you at that time observe the presence of mildew in Mr. Smith's clusters?

A. Yes, I did.

Q. Had you observed the presence of mildew in other hop crops [109] that season?

A. Yes, quite a little. It seemed to me that there was quite a little around through——

Q. Did you, for instance, have mildew in your own hops that year?

A. Yes, we were affected very severely that year.

Q. How would you characterize the mildew in Mr. Smith's yard, as to whether it was much or little or average or what?

A. Well, I don't think it was as severe as it was in a lot of cases or yards that I had seen.

Q. Did you have occasion to go back again at any time to his place? Did you see his crop any more after that?

A. No, not after that date.

Q. Did you have occasion to examine some samples of his hops?

A. Yes, I seen samples of his hops, I think, about three different times.

Q. Did you make an observation of those samples, to look at them and see what they looked like?

A. Yes.

Q. Did you observe the presence of mildew in those samples?

A. Yes.

Q. How did they compare with the general average of hops in the Willamette Valley that season?

A. Well, I think that they appeared a little

(Testimony of Wilbert Aman.)

better than the general average of the samples that I had seen. [110]

Q. How did they compare, for instance, with your own hops?

A. Well, ours were very severely affected, and there were a lot of these what they call nubbins and undeveloped hops in there, and quite a lot of red ones in.

Q. In your own yard? A. Yes.

Q. Did you dispose of your own crop?

A. Yes we had a contract on them.

Q. Whom did you have a contract with?

A. Well, it was with J. W. Seavey.

Q. What kind of a contract was it?

A. Well, it was similar to this one, similar to the one in this case here. The only thing, it was a regular straight contract. It didn't have any advance in price.

Q. It had a fixed price and not a market price contract? A. Yes.

Q. What was the fixed price for your hops?

A. This was made a little earlier in the season, and I think it was made somewhere around the first of June. It was made at 45 cents based on an 8-per cent picking.

Q. Around the first of June did it look like 45 cents was a pretty fair price?

A. At that time there was practically no mildew; that is, it didn't show up at all, and it looked like it was.

Q. At the time your crop was contracted did it

(Testimony of Wilbert Aman.)

look as though [111] there was going to be a large crop of hops in '47?

A. It did look like there was going to be quite a big crop at that time.

Q. Did Seavey subsequently take your crop of hops? A. Yes, he took them all.

Q. Would you say that they had more mildew in them than Smith's did?

A. Yes, they were quite severely affected.

Q. About when did he take yours in, do you recall?

A. It was about the 13th of October, I think; somewhere in there.

Q. Were those clusters like Kilian's?

A. Yes, they were late clusters.

Mr. Kester: I think that is all.

### Cross-Examination

By Mr. Kerr:

Q. Did any of the hops in these growers' yards you saw in 1947 appear to be badly infested with mildew?

A. Well, not that I could see. I think they were all harvested that I know of.

Q. You don't know of any grower that failed to harvest his hops because of mildew?

A. Not in that district over there.

Q. Do you know of any grower in the Willamette Valley that did not harvest his '47 crop because of mildew infestation? [112]

A. No, I can't say that I do. There was some that maybe left part of them, but they picked the

(Testimony of Wilbert Aman.)

best ones, maybe, and left parts of the badly infected ones.

Q. Did you say that the market price for cluster hops, Oregon clusters, in early 1947 was 45 cents?

A. That is what the contract price was at that time. That is what they were contracting for about that time.

Q. Was that about the market price?

A. Well, that was on futures; yes, future contracts.

Q. To your knowledge did the futures contract price go up after that?

A. Well, it was shortly after that, why, we got this about an infestation of mildew, and the market gradually went up to—jumped up to 50 and 55, on up to—

Q. Was that because the mildew threatened to reduce the quantity of good grade hops?

A. Yes, I think that was the reason.

Q. Would you say that because of the comparative shortage of prime quality hops resulting from mildew damage that the price for prime quality hops went up?

A. Well, I don't know if it was for prime quality hops that caused it to go up, but it was just the demand for the hops. Thinking that there was going to be a short crop, there would be a lot of brewers, I guess, that were getting a little worried about getting these hops, enough to make their brew.

Q. You say they were worried about getting



(Testimony of Wilbert Aman.)

enough. Do you mean getting enough good quality hops or getting just any hops?

A. Well, it seems just getting any hops, because a lot of these hops that they went out and contracted for at that time showed traces of mildew in them then on the vines.

Q. That is, there was mildew in the yards?

A. Yes.

Mr. Kerr: That is all.

### Redirect Examination

By Mr. Kester:

Q. One more thing, Mr. Aman. Did you contract your fuggles separately from your clusters?

A. Yes, we sold the fuggles later on. That was, oh, I imagine about the middle of August.

Q. Were they under contract? A. Yes.

Q. I see. What did you get on your fuggles?

A. 92 cents.

Q. About what time was that?

A. Well, that was—we made that contract, I think it was, around the middle of August. They were based on this advance, one of these 85-cent open-end.

Q. That was an open-end contract, was it? [114]

A. Yes.

Q. So that you got to pick the market price?

A. Yes.

Q. Were your fuggles affected by mildew or anything?

A. No, not to my knowledge, that I could notice.

(Testimony of Wilbert Aman.)

They had a little wind whip in them, though; a little reddish color to them.

Mr. Kester: I think that is all.

(Witness excused.)

Mr. Kester: If the Court please, the other person that we had expected to call on quality is the chemist from Oregon State College who made the analysis of Mr. Smith's samples. Now he was to have been here at 1:00 o'clock today.

The Court: Put on another witness.

Mr. Kester: Well, with the exception of that, I have no further testimony. I understand we have used up our quota of experts under the ruling, and Mr. Bullis I suppose has been detained by the snow, because he apparently has not arrived here.

The Court: That ends your case subject to Bullis?

Mr. Kester: That is correct, except that if for any reason Mr. Bullis is not permitted to testify on that we could still be entitled to one other expert.

The Court: All right. Call a witness, Mr. Kerr.

### LAMONT FRY

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kerr:

Mr. Kerr: I presume it is unnecessary to iden-

tify this witness, inasmuch as the record in the other case already shows who he is.

Q. Mr. Fry, did you negotiate with Kilian Smith in 1947 with regard to purchasing his late cluster hops? A. I did.

Q. Will you state when that occurred and what you did in that connection?

A. It was about August 17th that I had signed him on a sales slip and purchased his hops. Fuggles and clusters, I think they were. I know it was clusters.

Q. What was the nature of those sales slips?

A. Well, it was the regular spot sales slip used for the purpose of description, money advanced, and so forth, in order to put that information on the contract for him to sign later.

Q. Had Mr. Paulus told you to take sales slips out to Mr. Smith's place? [116]

A. No, he didn't know that I was making the deal that day. I had orders to buy and Mr. Smith agreed to sell.

Q. At that time what was the discussion between you and Mr. Smith concerning his cluster crop?

A. Well, he wanted to know if he had mildew in whether they would accept the crop, and I told him there was no hops accepted on the vine, and he insisted on my looking at them, so we went down in the yard to look at them.

Q. This was the first time you had been at his yard, was it?

A. This was the first time I had ever seen his

(Testimony of Lamont Fry.)

hops. I had talked to Mr. Kilian Smith before that, yes, quite a few times.

Q. Did you go down into his cluster yard at that time? A. We did.

Q. Did you look at those cluster hops?

A. Yes.

Q. How far along developed were they?

A. Well, the hops that would form—or that the mildew didn't blight to the extent of killing were already formed. They were not ripe, however. In other words, the lupulin wasn't filled out to the degree of being ripe, but the cone itself was filled; I mean, in size it had filled.

Q. Was this a late attack of mildew?

A. This attack came around July and August, the latter part of July and the first of August, I imagine, from what he said. [117]

Q. How heavy a mildew infestation did you note at that time?

A. Well, that is hard to explain. However, some of the hills of hops had all dried up and had died. What was left was quite red. But other hills were clean, and some hills had—the tops of the hops would be red where the hops on the bottom of the vine would be green. And it was generally throughout the yard that way. That is why we walked all through it.

Q. Did you note generally throughout his yard substantial quantities of hops which were not affected by mildew?

(Testimony of Lamont Fry.)

A. Oh, yes. That is what we were basing our estimate of the crop on.

Q. That is, you were basing your estimate of the crop on what?

A. On the green hops that were left.

Q. That is, hops not affected by mildew?

A. That is right.

Q. How was the set of the hops as a whole at that time? Was it heavy?

A. Very heavy, yes.

Q. That would include the mildew-infected hops?

A. That is right. In estimating the yard, the ones where the mildew had taken it, being heavy vines, I assumed it would have been very heavy if the attack had not taken that particular vine.

Q. The contract, I believe, which is Exhibit 1, places an estimate of 10,000 pounds on the crop of clusters that year. [118] Was that estimate suggested to you by Mr. Smith or was it your estimate?

A. That was an estimate that was agreed upon between both of us, that that is about what he would be able to pick of decent hops.

Q. By "decent hops" you mean what?

A. Well, green hops. Let's put it that way.

Q. Was that the estimate of the hops which would come up to contract quality?

A. The hops hanging there—I couldn't tell what they would be, because I didn't know what he would pick or what he would bale or dry or anything. I am speaking of the green hops hanging on the vine now; not of prime hops in the bale, which I know nothing about until they get in the bale.



(Testimony of Lamont Fry.)

Q. Was it possible at that time to make any determination of what the hops would be like when they were in the bale?

A. No, because I didn't know what he was going to pick.

Q. Did you and Mr. Smith at that time discuss selective picking of the crop?

A. Oh, yes. That was understood, that he wouldn't pick any mildew, naturally.

Q. How long do you think you were out at his yard at that time?

A. Oh, a half or three-quarters of an hour, I imagine, walking through the yard.

Q. Have you related to the Court the full conversations between [119] you and Mr. Smith on that occasion relative to mildew infestation of his yard?

A. Most of it. He asked me if we would accept the hops or if we would accept hops. I told him he would have to pick them and then we would be able to tell that, depending on what he did to them. There is no way for me to accept or reject the hops——

Q. Have you ever been authorized by Mr. Paulus to accept hops for Mr. Paulus or for Hugo V. Loewi on the vines?      A. No.

Q. Did you go back to Smith's yard at a later time?

A. Yes, when I took a check out, after he had started picking two or three days.

Q. Do you recall about when that was?

A. Why, I think that was the latter part of Sep-

(Testimony of Lamont Fry.)

tember—I mean August, is what I think it was.

Q. The latter part of August?

A. I think that is when it was.

Q. Was he picking his cluster crop then?

A. Yes, he had been picking two or three days.

Q. What check was it that you took out to him at that time?

A. Well, it was his advance check that was filled out of the moneys that were to be entered in the contract. I was supposed to enter the moneys when we decided what was to be advanced.

Q. Were those advances under the cluster or fuggle contract? [120] A. The clusters.

Q. The cluster contract. Did he tell you how much money he would need for picking?

A. We agreed to all that. It seemed, though, after he had picked a while, he had to raise the price of picking, so I think the check reads \$3,000.

Q. How did you arrive at that figure of \$3,000?

A. Well, if my memory serves me right, we arbitrarily agreed on that on account of him paying more than 3½ for picking.

Q. Was that the figure that he requested?

A. Oh, it has to be a meeting of minds or we wouldn't be able to make the deal, so I imagine he requested that and we agreed upon it, or talked about it.

Q. Did you talk at that time with Mr. Smith about the appearance or condition of his cluster hops?

(Testimony of Lamont Fry.)

A. Only generally in this way: That they looked pretty much like they had before. There hadn't been any change particularly in his hops, but the only remark that was made, we looked at a few baskets of hops and walked around into his yard, and then I cautioned him on his picking and his trying to be careful to pick all the red hops out he could. He said he would, and then I left.

Q. Did he at that time ask you if you would accept the hops?

A. Oh, yes. He tried to pin me down again whether I would accept the hops. [121]

Q. What did you tell him at that time?

A. I told him I had no way of accepting the hops. I never accepted hops in the field. It was up to him. If he had the best hops with no mildew, he could still ruin them between the field and the bale, so naturally I couldn't accept any hops under those conditions.

Q. At the time of this second occasion when you were in his yard were there still substantial quantities of cluster hops which you noted were not as yet affected by mildew?

A. They were approximately the same as they had been before.

Q. Did he have any cluster hops baled at that time?      A. No.

Q. Did he have any in the kiln?

A. He had about 25 sacks dumped out on the kiln floor.

Q. Did you look at those?      A. Yes.

(Testimony of Lamont Fry.)

Q. Did you note their appearance?

A. About the same as they were in the baskets in the field.

Q. What was that appearance?

A. They were a little rough in picking, and he had quite a few red ones in there, the same as I had told him when we were in the field, cautioning him about picking them in that way.

Q. Did you at that time warn him about picking the red hops?

A. Oh, yes. We didn't go into details because, after all, he is the one that is picking. He bosses his own yard, and he was [122] bossing his own yard.

Q. Did you at that time advise Mr. Smith whether or not he should pick his crop?

A. No, no.

Q. Did you at any time advise Mr. Smith as to whether or not he should pick his crop?

A. No, I had no authority to, nor did I.

Q. Did he ask you whether or not he should pick it?

A. Yes.

Q. What did he say to you about that?

A. He wanted to know if they would accept the hops. I told him I didn't know; I had no way of telling him.

Q. Were those the words he used?

A. That is right. He wanted to know if they would accept the hops—if they would accept the hops. That is what he was trying to get at.

(Testimony of Lamont Fry.)

Q. Did he ask you whether or not he should continue picking?

A. After I told him that I think not. I don't recall the exact words, no.

Q. You don't recall the exact words that he used?

A. About the continued picking. That is what I mean.

Q. You don't recall those exact words; is that right?

A. Only, "Will they accept the hops?" That is the point.

Q. At that time did he make any comments to you about the mildew damage? [123]

A. No, there was none outside of the accepted fact that it was there, the same as it had been before.

Q. Did he indicate to you why he was asking you whether or not you would accept the hops?

A. Well, he wanted me to put myself on record, I suppose, so that he would be sure to get his hops delivered.

Q. Did you tell him whether or not Hugo V. Loewi would accept the hops?

A. No. I had no way of knowing one way or another.

Q. Did you speak to Mr. Smith's drier on that occasion?      A. Yes.

Q. What did you say to him?

A. I cautioned him about his drying, was all.

Q. Why?

A. Well, it seemed as though—I think, if my memory serves me right, we had some of his fuggles



(Testimony of Lamont Fry.)

—anyway, it was generally cautioning him on his drying. That was all. Maybe it was from the past, I knew he had some tough hops or slack hops before, and just a general caution.

Q. Were you out at Mr. Smith's at any time after this second visit you mentioned?

A. No.

Q. Those are the only two visits that you made to his yard; is that right?

A. To the hopyard itself, yes. [124]

Q. Did you later inspect the cluster yard, the cluster hops, in the bales?      A. Yes.

Q. Did you take the tenth-bale samples?

A. Yes.

Q. Was Mr. Smith present when you took the tenth-bale samples?      A. Yes.

Q. Do you recall when it was that you took those samples?

A. No. You have the date there on the weight tally. I believe it is around October 1st. I don't know.

Q. There is being handed to you Exhibit 13. I will ask you if you can tell from that the date on which you took the tenth-bale samples of the clusters?      A. That would be October 3rd.

Q. That is the date on which you took the tenth-bale samples of the clusters?

A. That is right.

Q. Where were they taken?

A. In the Oregon Electric warehouse at Salem.

Q. Was Mr. Smith present at that time?

(Testimony of Lamont Fry.)

A. Yes, he was.

Q. Was anyone else present?

A. There may have been. I forget. Mr. Weathers might have been present, but I don't remember that for sure.

Q. Did you take any type samples of the Smith clusters before [125] the tenth-bale samples were taken?

A. Yes, twice.

Q. You took the type samples? A. I did.

Q. Where did you get those?

A. From his hops in the Oregon Electric warehouse.

Q. When did you take the type samples?

A. I don't know. I would have to refer to the records, but I imagine, oh, two or three weeks before that.

Q. That is, sometime before the taking of the tenth-bale samples of those clusters; is that right?

A. That is right.

Q. Was Mr. Smith present at that time?

A. No.

Q. In taking the type samples did you follow the customary procedure used in the hop trade?

A. Yes.

Q. And in taking the tenth-bale samples did you follow the same procedure that you have outlined in the previous case?

A. Yes.

Q. Prior to taking the tenth-bale samples did you present to Mr. Smith what is marked Plaintiff's Exhibit 5?

A. Yes.

Q. Will you state the circumstances surrounding

(Testimony of Lamont Fry.)

your presentation to Mr. Smith of that form of letter?

A. I don't remember whether this was in the office or at the [126] warehouse, but it was either one place or the other, and I told him that in order to inspect those that he would have to sign this agreement not holding us responsible and that this wouldn't constitute an acceptance of his hops. And he signed this, and then we went ahead with the inspection.

Q. Was the inspection; that is, the taking of the tenth-bale samples, after he had signed that letter?

A. Oh, yes.

Q. And by whose instructions did you obtain from Mr. Smith his signature to that letter?

A. Mr. Paulus instructed me to do this before we graded the hops or inspected them.

Q. What did you do with the hops after you took the tenth-bale samples? Were they weighed?

A. Yes, they were numbered and the hops weighed.

Q. Did you place any identification or mark upon the bales other than the bale numbers?

A. No.

Q. At the time that you took the tenth-bale samples did you have any discussion with Mr. Smith concerning the quality, condition or grade of his cluster hops?

A. Not to my memory, anything that would be of any concern, if we did.

(Testimony of Lamont Fry.)

Q. What did you do with the type samples that you took of his cluster hops? [127]

A. Took them to the office and in the usual way sent them East.

Q. That was whose office?

A. Mr. Paulus' office.

Q. By East you mean Hugo V. Loewi's?

A. Hugo V. Loewi's office.

Q. And were they handled in the same manner in which you customarily handled such type samples? A. They were.

Q. What did you do with the tenth-bale samples?

A. Well, wasn't that what you were speaking of, tenth-bale?

Q. No, I believe my previous question was with respect to the type samples.

A. Oh, the type samples were sent in in the usual way and also the tenth-bale samples.

Q. That is to say, you took the tenth-bale samples from the warehouse to Mr. Paulus' office; is that right? A. That is right.

Q. To your knowledge were they then sent East?

A. They were.

Q. What portions of them, if you know?

A. About three-fourths of them.

Q. That is, three-fourths of each sample?

A. Of each sample, of the tenth-bale samples.

Q. Did you at any time, Mr. Fry, have authority to accept [128] Mr. Smith's 1947 cluster hops?

A. No.

(Testimony of Lamont Fry.)

Q. Did you at any time have authority to accept any portion of those hops? A. No.

Q. Did you at any time tell Mr. Smith that you would accept any of those hops? A. No.

Q. Did you at any time tell Mr. Smith that Hugo V. Loewi, Inc., would accept any of those hops?

A. No.

Mr. Kerr: That is all, Mr. Fry.

(Thereupon an adjournment was taken until tomorrow, January 28, 1949, at 9:00 o'clock a.m.) [129]

(Court reconvened at 9:00 o'clock a.m., Friday, January 28, 1949.)

### LAMONT FRY

a witness on behalf of Defendant, having been previously duly sworn, resumed the stand and further testified as follows:

#### Direct Examination

(Continued)

By Mr. Kerr:

Q. Mr. Fry, did you have occasion recently to deliver a sample of the Smith late clusters to Mr. G. R. Hoerner, at Oregon State College?

A. Yes.

Q. Do you recall when that was?

A. Wednesday or Thursday of last week.

Q. At whose direction did you make that delivery? A. Mr. Paulus.

Q. What sort of sample did you deliver to Mr.



(Testimony of Lamont Fry.)

Hoerner? A. I don't know what you mean.

Q. Where did you get the sample you delivered to Mr. Hoerner? A. From Mr. Paulus' office.

Q. Was that one of the tenth-bale samples that you drew from the Smith hops?

A. I am sure it was, yes.

Mr. Kerr: That is all. [130]

### Cross-Examination

By Mr. Dougherty:

Q. Do I understand that you went out with Mr. Oppenheim in the middle of August, 1947, to examine hopyards in the Valley?

A. I think a day or maybe a day and a half, yes.

Q. Did any of the hopyards you examined have downy mildew? A. Yes.

Q. Did you negotiate this 1947 contract with Mr. Smith? A. I did.

Q. Did you have authority to negotiate it with him? A. I did.

Q. From whom?

A. Well, from Mr. Paulus.

Q. Did you have authority to agree on the floor price?

A. I had orders, yes, from Mr. Paulus.

Q. Will you explain that?

A. Well, he gave me orders that I could pay the floor price, such-and-such a price.

Q. To Mr. Smith?

A. To whomever I was buying from.

Q. You discussed the Smith deal with Mr. Paulus, did you not?

(Testimony of Lamont Fry.)

A. He knew that I was trying to buy his hops, yes.

Q. Did you have authority to agree on the estimated crop? A. Yes.

Q. When did you first see Mr. Smith in this connection? [131]

A. I think it was about August 12th. I am not so sure as to the date, but it was early in August.

Q. Was he then picking his fuggles?

A. I believe he was, yes.

Q. Was he then about finished picking his fuggles?

A. I think he finished picking his fuggles a day or so before the contract was signed, or the deal was made.

Q. At the time the deal was made had he finished picking his fuggles?

A. I would say he had, yes, or thereabouts.

Q. What did you talk about with Mr. Smith when you first saw him on about August 12th?

A. At that time we had an order for only fuggles and he wasn't interested in selling only fuggles, and the floor price wasn't high enough. Anyway, we didn't get together at that time.

Q. He wanted to sell his clusters along with his fuggles?

A. He said, "When the price comes up high enough I want to sell them both at the same time."

Q. He didn't want to sell his fuggles alone?

A. He didn't want to sell any hops at that time.

(Testimony of Lamont Fry.)

He said he would like to sell both because he knew I only had an order for fuggles at the time.

Q. You told him you only had an order for fuggles?      A. That is right.

Q. What did you do after that conversation?

A. I went on my general work.

Q. I mean, in connection with this transaction?

A. Nothing, at that particular time.

Q. Did you go back and tell Mr. Paulus about it?

A. Mr. Paulus knew. I told him, I think, that he had some fuggles for sale, an overage on his contract, a prior contract, with Mr. Seavey.

Q. How about the clusters?

A. I might have mentioned them, just in a general way, yes.

Q. As a matter of fact, didn't you tell Mr. Paulus that Mr. Smith wanted to sell his clusters with the fuggles?      A. I could have.

Q. Is it the fact that you did?

A. Well, I more than likely did. If I talked about one, I more than likely talked about the other, in general conversation.

Q. For the purpose of refreshing your memory, you remember when your deposition was taken in this case?      A. Yes.

Q. Reading from Pages 2 and 3, you said, "He,"—referring to Mr. Smith—"had about 50 bales left, so he wanted to sell his clusters, too, and I only had an order for fuggles, so he said, 'Go back and see if you can get an order on clusters as well as

(Testimony of Lamont Fry.)

fuggles.' So I went back and talked to Mr. Paulus."

Is that correct?

A. That is right. That is what I said before.

Q. Did you subsequently get an order to buy clusters as well as fuggles? A. I did.

Q. Did you see Mr. Smith in the meantime?

A. I imagine I did, yes, but I wouldn't say where or any particular date, because it wasn't—we hadn't negotiated any deal until the time I seen his hop-yard and he signed——

Q. About what date was that?

A. I think the records will show, the files, but I think it was around the 17th or 18th.

Q. Around the 17th or 18th of August?

A. I think that is when the contract was signed.

Q. He had, then, finished picking his fuggles?

A. I think so.

Q. Did you examine his hopyard at that time?

A. Which one, the fuggles or the clusters?

Q. The cluster yard.

A. Before he signed that sales slip, I examined his yard, yes.

Q. Walked all through the yard, did you?

A. I did.

Q. Did the yard at that time have downy mildew? Did the yard at that time have downy mildew in it? A. It did.

Q. After having seen the yard, did you sign up Mr. Smith on a sales slip? [134] A. Yes.

Q. From your examination of the yard, is it a fact that you knew as a practical matter that the

(Testimony of Lamont Fry.)

yard could not be picked without showing mildew in baled hops?

A. Depending on how you could pick them. I imagine you could see that.

Q. As a practical matter, did you know that it could not be picked without showing mildew in baled hops?

A. I didn't know how it would be picked. I had no way of knowing. I never have had any experience in picking mildewed hops myself.

Q. You are, yourself, not experienced in picking hops, is that correct?

A. I never had any experience in picking mildewed hops of that type.

Q. For the purpose of refreshing your memory, Mr. Fry, in the same deposition that we are speaking of—I now read from Page 26—at this time you were speaking of the subsequent conversation you had with Mr. Smith: “Naturally there were red hops in there and if they didn't pick any more—put in any more than he could help in there—because, after all, he knew the contract and he was supposed to pick decent hops.”

When you say “Naturally there were red hops in there” what did you mean by that?

A. I was going to ask that question, wasn't that in the deposition [135] where we were talking about looking at these hops when they were picked in the basket?

Q. Yes.



(Testimony of Lamont Fry.)

A. That is what they were. I seen them. I admit I seen those hops in the basket.

Q. What did you mean by "Naturally there were red hops in there"?

A. Well, evidently I meant the fact they were in there and I was admitting that they were in there at the time.

Q. Did you mean you knew that the yard could not be picked then without showing red hops in the pickers' baskets?

A. I don't think I mean that because I didn't say that.

Q. After you examined his yard, after he finished picking the fuggles and you signed him up on the sales slip, when was the next time you saw his yard?      A. At picking time.

Q. Do you recollect about what date that was?

A. Around the 25th. I think the records will show the date. I brought the check out to him.

Q. You brought a check out to him?

A. I did.

Q. Let's go back for a moment to on or about August 18th when you signed him up on a sales slip. Did you give him a check at that time?

A. No. [136]

Q. This was on or about the 27th; is that the first check you gave him?

A. That is the only check I gave him, to my knowledge.

Q. And he had then finished picking his fuggles?

A. I think he had. I will say that he had.

(Testimony of Lamont Fry.)

Q. On the 27th, now?

A. Oh, yes. He had finished then, yes.

Q. So you knew that the check you were giving him for advances was a picking advance on the clusters? A. That is right.

Q. Was that check fully filled out when you took it out? A. No.

Q. What was blank on it? A. The money.

Q. The amount of money?

A. That is right.

Q. Did you have authority to fill in the check?

A. I did.

Q. Did you at that time, before giving him the check, walk out into the yard? A. Yes.

Q. Did you look in the pickers' baskets?

A. I did.

Q. Did you see red hops in there?

A. I did. [137]

Q. Did you give certain instructions about his drier? A. I did.

Q. Did you at that time tell Mr. Smith that you would look at his hops and if they were about the same as they had been before you would give him the advance? A. I think I did.

Q. That is what you told him, is that correct?

A. I think it was.

Q. Were they about the same as they had been before?

A. They were about the same they were at the time the contract was made.

Q. Did you give him the advance?

(Testimony of Lamont Fry.)

A. I did.

Q. I believe the contract called for an advance of \$2500?      A. Yes.

Q. How was that computed?

A. I think that advance shows 25 cents a pound on 10,000 pounds.

Q. How much did you give him, actually?

A. \$3000, the check shows.

Q. How was that computed?

A. That could be from the fact we was paying 5 cents a pound at that time instead of 3½.

Q. Could that have been because your estimate of the crop went up?

A. No, I don't think so. I don't think there was any estimate, [138] only the hops looked like they had before, and he could have picked 35 bales or he could have picked 60 bales or he could have picked 70 bales, depending on what he wanted to pick himself.

Q. You saw the hops in the pickers' baskets?

A. I did.

Q. You saw the hops in the drier?

A. I saw 25 sacks, approximately.

Q. And you knew how he was picking?

A. I did.

Q. You gave him an advance for \$3000?

A. Yes.

Q. Did you subsequently weigh in his hops at the Oregon Electric?      A. Yes.

Q. You are the one who took the type samples and tryings and the tenth-bale samples, is that correct?      A. That is right.

(Testimony of Lamont Fry.)

Q. Did the tryings and the tenth-bale and type samples all correspond?

A. The tenth-bale samples corresponded pretty close to the—or the tenth-bale samples to the type samples, yes.

Q. Did you accept or reject any bale at the time you inspected them?

A. No, I didn't accept or reject any bales. I told him to take two bales home and put a little heat under them; they had too [139] much moisture in them.

Q. They were subsequently put on the weight slip, is that correct?

A. Mr. Byers put those on.

Q. Did you ever have any authority to either accept or reject any of those hops, Mr. Smith's hops?

A. No.

Q. Even at the time you inspect them, is that correct?

A. That is right.

Q. Mr. Fry, if hops are inspected, graded, and weighed in, is that considered an acceptance in the hop trade?

A. Usually if they are marked, yes.

Q. Ordinarily, when they are run over the scales?

A. Depending on what you run them over the scales for

Q. Why did you have Mr. Smith in this case sign this written form to weigh in his hops?

A. As I stated before, that was orders from Mr. Paulus.

Q. On or about August 27th, when you inspected

(Testimony of Lamont Fry.)

Mr. Smith's yard for the purpose of determining whether or not the hops were the same as they had been before, did you at that time instruct him not to pick?      A. Not to pick?

Q. Yes.      A. No.

Q. Did you at that time express any dissatisfaction concerning [140] the way his hops were picking?      A. Yes.

Q. What did you say?

A. I told him they were too rough. I was afraid he was going to have a high quantity of stems and leaves.

Q. Did you tell him his picking was a little rough?      A. Something to that effect.

Q. Something to that effect?      A. Yes.

Q. Was that just the general conversation?

A. That was.

Q. What was your authority for filling in the amount of that check?

A. I based that on hops that had run bad or worse than they were, if there was a less amount of green hops than they were—that is what I based that on.

Q. Did you have authority to fill in that check, say, for \$5000?

A. Depends on whom I would be giving it to.

Q. You had general authority?

A. General authority, yes. Depends on what his yard is or who——

Q. After inspecting the yard you made an ad-



(Testimony of Lamont Fry.)

vance in a greater sum than called for by the contract?

A. Couldn't call it that because the contract said an estimate more or less. [141]

Q. Your estimate went up?

A. My estimate didn't go up. He asked for a little more money on account of the advances—on account of the higher cost of picking, and we just arbitrarily set it at \$3000, one way or the other.

Q. Why did you not fill it out for the figure set in the contract?

A. Because I imagine he wanted a little more money.

Q. Were the picking advances computed on an estimate of the crop?

A. I wouldn't say that for sure. I don't recall how we come to that figure.

Q. Do I understand then, you had authority to make such advances as you might deem necessary?

A. Yes.

Q. And at the time you made that advance you had seen Mr. Smith's picking in process?

A. I seen four or five baskets of hops, yes.

Q. And you had seen the hops in the drier?

A. No, not until after the advance was made.

Q. Immediately after the advances was made?

A. Yes.

Q. You knew that these advances would be used to pick the clusters, is that right?

A. I did, yes. [142]

Mr. Dougherty: Thank you, Mr. Fry.

(Testimony of Lamont Fry.)

Redirect Examination

By Mr. Kerr:

Q. Have you ever told a hop grower not to pick his hops? A. No.

Q. Have you ever had any authority to tell a hop grower not to pick his hops? A. No, sir.

Mr. Kerr: That is all.

Mr. Dougherty: That is all.

(Witness excused.) [143]

JAMES A. BYERS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. James A. Byers.

Q. Where do you live?

A. Salem, Oregon.

Q. What is your occupation?

A. An employee of C. W. Paulus.

Q. How long have you been employed by C. W. Paulus? A. Since the fall of 1943.

Q. In what capacity?

A. General office work and some outside field work.

Q. Did you take out to Kilian Smith ranch in 1947 the form of contract on his cluster hops?

A. I did.

(Testimony of James A. Byers.)

Q. Do you recall when that was?

A. I believe it was on the 19th day of August.

Q. Did you see Mr. Smith there at that time?

A. I did.

Q. How long did you stay at his ranch at that time?      A. Oh, possibly half an hour.

Q. Were you in a hurry to get away? [144]

A. Yes.

Q. Did you look at his cluster hops?

A. No, sir.

Q. Did you go out into his yard?

A. No, sir.

Q. Did you have any conversation with Mr. Smith at that time about his hops?

A. No, sir.

Q. Or about any mildew condition of the hops?

A. No, sir.

Q. Did Mr. Smith say anything to you at that time about mildew infestation of his cluster yard?

A. I don't believe he did, no.

Q. Did Mr. Smith sign the cluster contract in your presence at that time?      A. He did.

Q. You are being handed Defendant's Exhibit No. 1. Will you look at the signature of the notary public, the notary's certificate, on the reverse side of that and state whether or not that is your signature as notary public?

A. That is my signature.

Q. When did you next see Mr. Smith, if you remember?

A. It was possibly two weeks later.

(Testimony of James A. Byers.)

Q. What was the occasion?

A. As I recall it, I was in the general vicinity and I stopped [145] to see Mr. Smith relative to the closing of his contract, the floor price on his contract.

Q. Did you look at his hops at that time?

A. No.

Q. Did you go out into his hopyard?

A. No.

Q. Did Mr. Smith say anything to you at that time about mildew infestation of his cluster yard?

A. I don't recall all of the—I don't recall any conversation with him about it.

Q. Did you see Mr. Smith at Schwab's warehouse after that?      A. Yes.

Q. When was that?

A. On the 24th of October.

Q. What was that occasion?

A. Mr. Smith stopped at the warehouse where I was working and asked me about taking in his hops.

Q. Which hops were those, fuggles or clusters?

A. At that time he asked me to take both fuggles and clusters.

Q. Were the fuggles and clusters in that warehouse at that time?

A. No, they were not.

Q. Were the fuggles in the warehouse at that time?

A. Not in Schwab's. They were in the Oregon Electric warehouse in Salem.

(Testimony of James A. Byers.)

Q. What was the discussion you had with Mr. Smith at that time [146] at Schwab's warehouse?

A. I advised Mr. Smith that I had authority to take in his fuggle hops, with the proviso that the advances on both the fuggles and clusters were to be deducted from the final payment.

Q. Did he ask you at that time to weigh in or take in his fuggle hops?

A. As I recall the conversation, he said he would have to think that over and would let me know.

Q. Did he at that time, before you had that conversation, ask you to take in his fuggle hops?

A. I don't believe he did, before that.

Q. Did he, on October 24th, ask you to take in his fuggles? A. Yes.

Q. You took in the fuggles after you made the statement you have just recited?

A. That is right.

Q. What did he reply when you told him that you would take in the fuggles if he would agree to deduct the cluster advances?

A. As I recall, he said he would have to think it over and would let me know the following day.

Q. Did he let you know the following day?

A. He did.

Q. Where were you when he communicated that, when he communicated with you?

A. At the Oregon Electric warehouse in Salem.

Q. Was that an oral conversation?

A. It was.

Q. What was the conversation?



(Testimony of James A. Byers.)

A. As I recall, it was along about 10:00 o'clock in the morning. I had just completed some other work on hops. I waited a while to see if Mr. Smith would show up. He finally showed up, I believe, about 10:30.

I again advised him we couldn't take the fuggle hops in without a deduction of the advances for both fuggles and clusters from the final payment, and he finally said, "Go ahead and take them in."

Q. Did you then inspect and weigh in the fuggles? A. I did.

Q. Was Mr. Smith present when you weighed in the fuggles? A. He was.

Q. What did you and Mr. Smith do after you had taken in the fuggles, after you had weighed in the fuggles?

A. After the fuggles were weighed, we went to Mr. Paulus' office, where I figured up the money due him and made out a purchase invoice and a check and handed them both to him.

Q. Did you at that time make out a check to Mr. Smith? A. I did.

Q. I hand you what has been marked Defendant's Exhibit 9 and ask you to state whether or not that is the check you have referred to? [148]

A. This *it* the check.

Q. And the amount of that check represents what, Mr. Byers?

A. The balance due Mr. Smith upon delivery of his fuggle hops.

Q. The Bailiff will hand you Exhibit 33-C. I

(Testimony of James A. Byers.)

will ask you whether or not the check which you have just referred to, that is, the amount of that check, was computed as indicated on that exhibit which has now been handed to you?

A. That is correct.

Q. Did you hand the check to Mr. Smith at that time?      A. I did.

Q. Did he accept the check?      A. He did.

Q. Did you have any further conversation with Mr. Smith at that time or at any other time concerning that check?      A. I did not.

Q. Did you discuss with Mr. Smith at any time the rejection of his cluster hops?

A. No, I did not.

Q. Did you at any time accept the cluster hops of Mr. Smith?      A. No, sir.

Q. Did you have any authority to accept the cluster hops of Mr. Smith?      A. I did not.

Q. Exhibit 33-C lists 10,986 pounds of fuggles at 91 cents a [149] pound. Is that 91-cents-per-pound price the basis on which you computed the amount of the check?      A. That is right.

Q. Was that the floor contract price for the fuggles?      A. Yes, sir.

Q. So Hugo V. Loewi, Inc., did take in and accept the fuggle hops of Mr. Smith at the floor contract price, is that correct?

A. That is right.

Q. Was that the complete delivery of his fuggle crop?      A. To my knowledge it was, yes.

(Testimony of James A. Byers.)

Q. That is the floor contract quantity, is that correct?      A. That is correct.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. As I understand, Mr. Byers, you took out the contract for Mr. Smith to sign?

A. That is correct.

Q. He was already signed up on a sales slip, is that correct?

A. If my memory serves me right, he was, yes.

Q. Why did you take out the form of contract for him to sign, then?

A. The sales slip is merely a memorandum of agreement and contains more or less the information to be included in a contract. [150]

Q. Do I understand you to mean, Mr. Byers, that you have never bought and sold hops on the basis of such a sales slip?      A. Spot hops, only.

Q. You have bought hops on the basis of such a sales slip?      A. Spot hops, not contract.

Q. What made these contract hops rather than spot hops?

A. They are not spot hops until they are in the bale.

Q. Is it a fact that you had Mr. Smith sign the contract in order to get a chattel mortgage on your advances?      A. That I don't know.

Q. As I understood it, you took the \$3500 check

(Testimony of James A. Byers.)

out with you when you had Mr. Smith sign the contract, is that correct?

A. As I recall, that is correct.

Q. You knew at that time, did you not, that Mr. Smith had finished picking his fuggles?

A. I didn't know, no.

Q. Did Mr. Smith so tell you at that time?

A. I found out when I arrived at his place.

Q. So, at the time you gave him that check you knew, did you not, that all the money would go into the clusters?      A. Not necessarily, no.

Q. Will you please explain?

A. I didn't know that he had finished paying his pickers. He might have owed his pickers money yet.

Q. Didn't he so advise you at that time? [151]

A. I don't recall that he did.

Q. Did Mr. Smith at that time tell you that he would use this on his clusters, and that he had already paid for his fuggles?

A. To my knowledge, he didn't.

Q. Do I understand that at that time you knew that he had finished picking his fuggles?

A. Yes.

Q. Was it acceptable to you for Mr. Smith to use this \$3500 advance to pick his clusters?

A. Yes, sir.

Q. With reference to the time Mr. Smith asked you to take in his fuggles, would you please tell us again what you told him?

A. I advised Mr. Smith my instructions were

(Testimony of James A. Byers.)

that I couldn't take delivery of his fuggles without the agreement that I deduct the advances from both the fuggles and clusters from the final payment.

Q. When you speak of the advances on fuggles and clusters, as a matter of fact, it is true, is it not, you are talking about advances on clusters?

A. I am speaking of the advances made under the terms of the contract.

Q. The contracts which were signed after the fuggles had been picked, is that correct?

A. Will you state that again?

Q. Were those contracts signed after the fuggles had been picked? [152]      A. That is right.

Q. Did you at that time tell Mr. Smith your instructions were—speaking now of the conversation about taking in the fuggles—that your instructions were not to inspect the fuggles unless he agreed to the deduction of all advances against the fuggles?

A. Not to take delivery of his fuggles, that is true.

Q. Would you have inspected them if he had not so agreed?

A. I don't believe I would have, no.

Q. So, then, as I understand it—Correct me if I am wrong, Mr. Byers—the balance of his fuggles was dependent upon the deduction of his cluster advances, is that correct?

A. That was the instructions I had.

Mr. Dougherty: Thank you.



(Testimony of James A. Byers.)

Redirect Examination

By Mr. Kerr:

Q. Is it the practice of the firm by which you are employed to require an accounting by the grower of his use of the advances paid to him under a term contract?      A. No, sir.

Mr. Kerr: That is all.

(Witness excused.) [153]

C. W. PAULUS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. You are Mr. C. W. Paulus?      A. Yes.

Q. Who testified in the previous case?

A. Yes, sir.

Q. Did you instruct Mr. Fry in 1947 to make an offer on the Kilian Smith cluster hops?

A. Yes.

Q. Did you authorize Mr. Byers to prepare the form of contract covering that sale?      A. Yes.

Q. Did you authorize Mr. Byers to tender that form of contract to Mr. Smith for execution?

A. Yes.

Q. Did you authorize Mr. Fry to accept any of the cluster hops of Mr. Smith?

A. At which time, to accept any of the cluster hops?

(Testimony of C. W. Paulus.)

Q. At any time. A. Baled hops?

Q. I beg your pardon? A. Baled hops?

Q. Cluster hops, at any time?

A. I told him to negotiate the contract, to make the contract, but I didn't instruct——

Q. Did you authorize Mr. Fry to accept any of the Kilian Smith cluster hops? A. No.

Q. Did you authorize Mr. Fry to negotiate a contract with Kilian Smith for the purpose of his cluster hops on the vine? A. No.

Q. Did you authorize Mr. Fry to negotiate with Kilian Smith for the purchase of his hops at any time prior to the baling of those hops? A. No.

Q. Have you ever purchased any grower's hops while they are on the vine? A. No.

Q. That is to say, have you ever purchased any grower's hops as hops on the vine? A. No.

Q. Have you ever purchased any grower's hops other than as baled hops? A. No.

Q. Have you ever been authorized by Hugo V. Loewi, Inc., to purchase any hops other than hops in bales? A. No. [155]

Q. Were you authorized by Hugo V. Loewi, Inc., to purchase the Kilian Smith cluster hops as hops on the vine? A. No.

Q. Were you ever authorized by Hugo V. Loewi, Inc., to accept the 1947 Kilian Smith late cluster hops under the written contract covering those hops? A. No.

(Testimony of C. W. Paulus.)

Q. Did Mr. Byers return the signed Smith cluster contract to you? A. Yes.

Q. Was it signed by Mr. Oppenheim for Hugo V. Loewi, Inc., in your presence? A. Yes.

Q. Where did that occur?

A. In my office.

Q. In Salem? A. Yes.

Q. Did you at any time go out to Mr. Smith's late cluster yard in 1947?

A. Yes, following the harvest.

Q. When was that?

A. Approximately September 15th or thereabouts.

Q. What was that occasion? What was the occasion for that visit?

A. When I went out to see him about the possibility of purchasing [156] from him an additional quantity of his fuggle hops which were on the contract to Mr. Seavey.

Q. Will you explain that situation?

A. I had received word from Mr. Smith that there was some question about Mr. Seavey receiving the fuggle contract, which is a contract prior to the Hugo V. Loewi contract on the fuggles, and that Mr. Seavey had suggested to Mr. Smith to endeavor to dispose of the hops which were contracted to him, Mr. Seavey, and that was the information given to me.

Thereupon I telegraphed that information to Hugo V. Loewi, Inc., asking if they would be interested.

(Testimony of C. W. Paulus.)

In reply I received instructions from Mr. Oppenheim that he would consider taking an offsetting amount of these fuggle hops in place of the cluster hops at the 91-cent price.

Q. Was that before or after the rejection of the cluster hops?      A. That was before.

Q. What was the date of this visit by yourself to Mr. Smith's yard?

A. I can't say exactly. It is something around the 15th of September or about the middle of September.

Q. What did Mr. Smith say to you at that time concerning that possible transaction?

A. He gave it consideration but subsequently decided not to accept that proposal.

Q. Did he later tell you he would not accept that proposal? [157]      A. Yes.

Q. Was that in writing or by telephone or orally?      A. Orally.

Q. Where was that that he told you he would not accept it?

A. I don't recall whether it was over the telephone or in my office.

Q. Then the proposal you are referring to was a proposal that Hugo V. Loewi, Inc., buy, at 91 cents a pound, a quantity of Kilian Smith's fuggle hops in substitute for a quantity of cluster hops?

A. That is right; approximately 15,000 pounds.

Q. Did you know at that time whether or not Seavey had a chattel mortgage on these fuggle hops?

(Testimony of C. W. Paulus.)

A. I didn't know, but I assumed he had. He had a contract.

Q. Your proposal was made notwithstanding the assumption that there was such a chattel mortgage on the fuggles? A. Yes.

Q. Did you receive at your office in Salem type samples taken of the Kilian Smith cluster hops in 1947? A. Yes.

Q. What was done with those samples?

A. They were re-packaged and sent to Hugo V. Loewi in New York City.

Q. Did you receive the tenth-bale samples which later were taken from the Kilian Smith late clusters in 1947? [158] A. Yes.

Q. What was done with those samples?

A. Likewise, they were prepared and re-packaged and sent to Hugo V. Loewi in New York.

Q. What portion of the type sample was sent to New York?

A. Approximately two-thirds to three-fourths of it.

Q. What portion of each of the tenth-bale samples was sent to New York?

A. Approximately the same.

Q. There will be handed you Exhibits 43, 45, 46 and 47.—43, 45-A, 46 and 47, rather. Were those made out in your office? A. Yes.

Q. What does each of those show with respect to the sending to the New York office of Hugo V. Loewi, Inc., of the samples of Kilian Smith 1947 late cluster hops?



(Testimony of C. W. Paulus.)

A. Exhibit 43 shows the transmittal of two samples of Lot 64, Kilian Smith clusters, 73 bales, by express to Hugo V. Loewi, Inc.

Q. On what date?

A. On September 10th.

Q. Can you state of your own knowledge whether or not the lot number which was assigned by your office to the Kilian Smith late cluster hops 1947 was No. 64?      A. Yes.

Q. The next exhibit refers to what? [159]

A. That refers to Kilian Smith late cluster hops, Exhibit No. 45-A, which is dated September 10th, showing the transmittal of one sample of Lot 64 taken from 73 bales of the Kilian Smith late cluster hops, 1947 crop, by air express, to Hugo V. Loewi, Inc.

Q. Were those type samples?      A. Yes.

Q. The next exhibit?

A. Exhibit 46 is dated September 20th and shows the transmittal of five samples of Lot 64, taken from the 73 bales of the Kilian Smith 1947 cluster crop, transmitted by air express to Hugo V. Loewi, Inc.

Exhibit No. 47, dated October 4th, 1947, shows the transmittal of seven samples taken from Lot 64, 73 bales of Kilian Smith 1947 clusters, being the tenth-bale inspection samples of Lot 64, which were sent to Hugo V. Loewi, Inc., by parcel post.

Q. There will be handed to you Exhibit 22. Is that a carbon copy of a letter addressed to Hugo V. Loewi, Inc., on the date shown thereon?

(Testimony of C. W. Paulus.)

A. Yes. This is an office copy of the letter addressed to Hugo V. Loewi, Inc., under date of September 20th.

Q. What occasioned your sending that letter to Hugo V. Loewi, Inc.?

A. The receipt by me of several letters and telegrams from [160] Hugo V. Loewi, Inc., in connection with the Kilian Smith cluster hops.

Q. There will be handed to you Exhibit 31. Will you explain the situation referred to in that telegram, or copy of a wire? Is it not addressed by you to Hugo V. Loewi, Inc.?

A. Yes, dated October 22nd.

Q. What was the reason for your sending that wire?

A. Reporting Mr. Smith's announcement that Mr. Seavey had not received his 20,000-pound fuggle crop and advising that both Seavey and Smith were interested in selling that 100-bale quantity of fuggle hops and, therefore, is interested in the purchase by Hugo V. Loewi, Inc., of these fuggle hops and it says: "He is still interested sell these hops since Seavey delivery appears doubtful and buyer encourages sale. Your purchase these hops may ease settlement your cluster advances and also expedite delivery your fuggle contract and shipment which now delayed pending Seavey action."

Q. Did you instruct Mr. Fry to obtain from Mr. Smith a signed agreement that Hugo V. Loewi, Inc., might inspect and weigh Mr. Smith's 1947 late clus-

(Testimony of C. W. Paulus.)

ter hops, without such being considered as an acceptance of those hops?      A. Yes, sir, I did.

Q. Why did you give Mr. Fry those instructions?

A. For the reason that prior to going through these hops I had received information from Hugo V. Loewi, Inc., that it was very [161] doubtful that they would accept the hops, and to go through the hops and inspect them and not weigh them, because if at some later date the hops *would* accepted, for one reason or another, if they were weighed in at that time it would duplicate the effort, and we thought we would weigh them merely at that time and then they could be stacked back there and, should the hops be rejected and later purchased, that job would be accomplished, so we decided to proceed on that basis, getting Mr. Smith's stipulation in a letter that the inspecting, marking and weighing would not constitute an acceptance, and that was directly understood by Mr. Smith.

Q. What do you mean by "marking?"

A. Marking the bales on the head, the number on the head.

Q. Did you authorize Mr. Fry or anyone else to place any marks other than such numbers on such bales?      A. No, I did not.

Q. Did you discuss that with Mr. Smith prior to instructing Mr. Fry to obtain such agreement?

A. Yes. I did personally, in my office.

(Testimony of C. W. Paulus.)

Q. Was Mr. Smith present in your office when you discussed the matter?

A. Yes, I discussed it with him in my office.

Q. What was your discussion, if you recall?

A. The explanation, as I have just stated, that we wanted to take tenth-bale samples and inspect his lot and send those [162] samples, those inspection samples, back to Hugo V. Loewi, Inc., for their final decision, and in order to expedite any subsequent purchase or possible delivery, to have the bales weighed all in the same operation but, prior to doing that, I had to have his—I told him I wanted a stipulation that it did not mean acceptance since I had no instructions to receive the hops at that time.

Q. Did you tell Mr. Smith at that time that you had been informed by Hugo V. Loewi, Inc., that samples of the late cluster hops previously submitted showed unsatisfactory quality or condition?

A. Yes.

Q. What did Mr. Smith say when you told him that you would have to get such an agreement from him?

A. He agreed that that was in order.

Q. Did he state that he would sign such a statement?

A. Yes.

Q. Did he offer any objection at all to signing such a statement?

A. No.

Q. Did he make any comment to you at the time you told him of the advice from Hugo V. Loewi, Inc., that the samples previously submitted were not favorable?

(Testimony of C. W. Paulus.)

A. I don't recall what his statements were. We discussed the matter on several occasions. I can't distinctly recall definite statements made by him.

Q. Do you recall whether or not that was the first time that you told him that the reports from Hugo V. Loewi, Inc.'s office were unfavorable on those hops?

A. No, I am sure that it was discussed with him prior to the time of his signing this stipulation.

Q. Do you recall such prior occasions?

A. Yes, I can recall several times Mr. Smith was in the office.

Q. When were those times, if you recall?

A. I can't recall the dates, but I remember Mr. Smith was up in our office one evening when we were wrapping samples, and he was discussing the matter of the possible acceptance of his hops.

Q. Was that referring to his clusters?

A. Clusters, yes, and I can recall another time prior to the time he signed this when Mr. Smith was in the office.

Q. At the time you referred to as being when the samples were examined, what was the conversation with respect to possible rejection of the hops?

A. The report was made to Mr. Smith that Hugo V. Loewi, Inc., did not like the cluster hops based upon their examination of the first samples submitted.

Q. Was that report made to Mr. Smith by you personally?           A. Yes.



(Testimony of C. W. Paulus.)

Q. Was there any previous occasion when you gave him such a report?

A. I may have written Mr. Smith a letter on that. [164]

Q. Do you recall any telephone conversation with him on the subject?

A. I can't recall any particularly to mind right at this time.

Q. Did you direct or instruct Mr. Byers not to pay for Mr. Smith's fuggle hops without a deduction of all advances made both on the fuggles and clusters?

A. I will answer your question in this manner, that at the time the office received the telegram from Hugo V. Loewi, Inc., on that particular phase of the transaction, namely, to receive only the Smith fuggle hops, or fuggle contract of 59 bales——

Q. What do you mean by fuggle contract?

A. To receive the hops under the fuggle contract, namely, 59 bales. I was in Yakima and the subject contained in the telegram was transmitted to me by telephone by Mr. Byers, and over the telephone I instructed him to contact Mr. Smith and advise him of the contents of the proposal made by Hugo V. Loewi, Inc., namely, to inspect the hops and pay for the same provided all the advances made under the fuggle and cluster contracts be deducted.

Q. You will be handed Exhibit No. 17. I will ask you whether or not that is at least one of the wires received on that general subject?

(Testimony of C. W. Paulus.)

A. This is one of the telegrams received from Hugo V. Loewi, Inc., on the subject of the Kilian Smith cluster hops.

Q. Will you read the portion of the wire specifically relating [165] to the deduction of cluster advances in settlement for the fuggles?

A. Yes. The telegram in that respect reads: "Notify grower we refuse to accept such hops on contract. Don't want them even at lower prices." That refers to previous growers' hops.

Then it continues: "Same applies to Lot 64, 73 bales Kilian Smith which we reject. Willing accept his fuggles based 90 cents for 8 per cent and apply cluster advances on fuggle settlement."

This telegram is dated September 16th and was received considerably in advance of the date under discussion, prior to the submission of this telegram.

Q. Do you recall when you received notice or information from Mr. Smith that his fuggle hops were ready for delivery?

A. I don't recall having received such a notice from Mr. Smith at any time that his fuggle hops were ready for delivery.

Q. Did you instruct Mr. Byers not to inspect the fuggle hops unless Mr. Smith agreed to the deduction of the cluster advances in settlement for the fuggles?      A. No, I didn't.

Q. What were your instructions to him on that subject of the deduction of the cluster advances? What were your instructions as to the deduction of

(Testimony of C. W. Paulus.)

the cluster advances from the settlement on the fuggles?

A. My instructions to him were based upon the wire that I had [166] received from Hugo V. Loewi, Inc., and which he read to me over the telephone from Salem, while I was in Yakima.

I instructed him to proceed on the basis of that telegram and make contact with Mr. Smith and endeavor to effect a settlement with him on the basis of the delivery of those 59 bales of fuggles, as set forth in the telegram.

Q. In 1947 was there any difference in the trend of the market, or the market price of fuggles and clusters? I do not mean with respect to the actual amount but with respect to the rising or lowering of the market price.

A. Fuggles and clusters did not vary greatly as between them in price, in the spring or in the fall.

However, the price incline began in August and there developed finally a differential of approximately 5 cents a pound premium for the fuggles over clusters, which continued until about December 1st.

Q. Do you know of any growers in the Willamette Valley in 1947 who did not harvest their hops during that year?

A. I can't recall any such grower to mind.

Q. Do you recall growers in the Willamette Valley who during that year failed to harvest part of their crop?

(Testimony of C. W. Paulus.)

A. Yes. I recall there were some growers that did not harvest all of their crop.

Mr. Kerr: That is all, Mr. Paulus. Thank you. [167]

Cross-Examination

By Mr. Dougherty:

Q. Mr. Paulus, with reference to this swapping of fuggles that you have testified about, do I understand at that time Hugo V. Loewi wanted more fuggles? Did I understand you correctly, Mr. Paulus?

A. Did you say swapping?

Q. Yes. A. Swapping of fuggles?

Q. Did I understand you to testify that Hugo V. Loewi, Inc., was at one time willing to take more of Mr. Smith's fuggles?

A. He proposed to take the fuggles in exchange for an offsetting amount of clusters.

Q. Who proposed it?

A. Hugo V. Loewi, Inc., as testified in the reading of this telegram.

Q. Were those other fuggles under contract to Mr. Seavey at that time?

A. Yes, they were.

Q. Did you encourage Mr. Smith to commit larceny by a mortgagor?

A. I most certainly did not.

Q. As a matter of fact, didn't you know it would have been acceptable to Mr. Seavey, the mortgagee, if that deal had been carried out?

(Testimony of C. W. Paulus.)

A. I certainly did not, since this proposal for the purchase of [168] the fuggles came from Mr. Kilian Smith to me, advising that Mr. Seavey did not want to take in the hops, that he couldn't take them in, and that both Mr. Seavey and Mr. Smith wished to sell the hops, and the proposal came to me that they wished to sell the hops and would Hugo V. Loewi, Inc., buy them.

Q. Mr. Smith and Mr. Seavey?

A. I mean—not Mr. Seavey, but Mr. Smith informed me that Mr. Seavey wanted to sell them.

Q. So Mr. Smith told you that it was acceptable to Mr. Seavey?      A. That is correct.

Q. With reference to Exhibit 45, I understand that proposal was made by Hugo V. Loewi, Inc., is that correct?

A. In reading this telegram it refers to a proposal made by Hugo V. Loewi, Inc.; however, that was preceded by information which I passed on to Hugo V. Loewi, Inc., relating to the proposal that Kilian Smith promoted by his conversation with Mr. Seavey, that Kilian Smith make an effort to sell 100 bales covered by the Smith contract.

Q. From this exhibit does it appear on September 25th you were instructed by Hugo V. Loewi, Inc., to make Smith a proposition to replace Lot 64, 73 bales of clusters, which were rejected, with 75 bales from his fuggles, provided "clusters which we reject for 75 bales——" That is a repetition there. But is the foregoing portion of the statement correct?



(Testimony of C. W. Paulus.)

A. That is verbatim from the telegram. [169]

Q. Was that offer subsequently withdrawn by Hugo V. Loewi, Inc.?      A. Yes.

Q. Was Mr. Smith still interested in the offer after Hugo V. Loewi, Inc., had withdrawn it?

A. No, he was not. He was interested in selling the fuggle hops, the entire 100 bales of fuggle hops which were under contract to Seavey.

Q. He was interested in selling the fuggles, and do I understand Mr. Seavey was also interested in them?

A. According to the information given me by Mr. Smith.

Q. Do I understand that Mr. Seavey to whom we have been referring is one of the independent hop dealers in this area?

A. I don't know just what you mean by "independent hop dealers."

Q. He does not operate exclusively for any buyer, is that correct?

A. He has been buying for several buyers.

Q. Is it correct that Hugo V. Loewi, Inc., refused to purchase 100 bales of fuggles or any portion of them?

A. He offered to buy them, a portion of them, and then later on decided not to.

Q. Mr. Paulus, did you have authority from Mr. Oppenheim personally to enter into this arrange-

(Testimony of C. W. Paulus.)

ment with Mr. Smith with respect to his 1947 fuggles and clusters?

A. Whether or not it was direct authority to buy Mr. Smith's I [170] can't say; I doubt it very much; but I had orders from him to buy fuggles and clusters from growers.

Q. Mr. Oppenheim was himself in the Willamette Valley at that time? A. That is true.

Q. Were you having daily discussions with him?

A. I saw him, yes, every day.

Q. At the time that you authorized Mr. Fry to sign Mr. Smith up on a sales slip, you knew, didn't you, that his yard had mildew in it?

A. I don't know that I did, no.

Q. Didn't Mr. Fry report to you that it had mildew in it?

A. He may or may not have. I was in and out of the office, away from the office. I gave instructions to my office by telephone late at night and early morning; sometimes transmitted through Mr. Byers, by Mr. Byers to Mr. Fry. Just how those negotiations were carried on at that busy season of the year I can't inform you today.

Q. Why was that season of the year so particularly busy, Mr. Paulus?

A. There was a lot of activity at that time in the buying field and in going around the territory and seeing the yards and also servicing our then existing grower customers. By "then existing"

(Testimony of C. W. Paulus.)

I mean growers with whom we had contracts at that time.

Q. Mr. Oppenheim was interested in buying a quantity of hops [171] at that time, was he not?

A. Yes. We had orders for a quantity of hops.

Q. Do you know whether or not Mr. Oppenheim was advised that this yard had mildew in it?

A. I can't say.

Q. Mr. Oppenheim was here at that time?

A. He was in Oregon and he knew there was mildew in yards in Oregon, definitely.

Q. At the time the sales slip was executed you knew, did you not, that Mr. Smith's fuggles had been picked?

A. No, I didn't know that detail at all.

Q. Well, why wouldn't you know such a detail?

A. I left that to my men in the office, to discharge that, after they received their general instructions as to how to proceed. I am not acquainted with all of those details.

Q. That was a matter for Mr. Fry to handle, is that correct?

A. What matter do you refer to? Just the matter that he had picked his fuggles at the time the contract was signed? What do you mean by that?

Q. The matter of making advances under this contract.

A. The arrangement with Mr. Smith, at the time the contract was negotiated, was that he would receive for the picking of the fuggle crops so much

(Testimony of C. W. Paulus.)

money and whether or not he had concluded the picking of the fuggle crop at the time the contract was signed certainly did not preclude then the payment to him [172] of the amount which the contract called for, for the specific picking of the crop.

Q. Mr. Paulus, you speak of the arrangement with Mr. Smith. Did you have personal knowledge of that arrangement?

A. It is all set forth in the negotiation, namely that——

Q. Did you negotiate with him?

A. The contract provided——

Mr. Kerr: Just a minute.

A. The contract provided the payment of specific amounts of advances for the harvesting of the fuggle crop. That was the arrangement.

Q. (By Mr. Dougherty): With reference to this contract, of course, you are acquainted with that form of contract, are you not? A. Yes.

Q. With reference to making advances it says “provided such sums are actually required for the cultivation, picking, drying and baling of said hops.”

What meaning does that clause in the contract have, Mr. Paulus?

A. Well, it seems self-evident what it means, that if the grower requires these funds for harvesting of his crop and to the extent needed they will be advanced.

Q. Do I understand your testimony to be, Mr.

(Testimony of C. W. Paulus.)

Paulus, that such advances are made regardless of the use to which they are put?

A. Most certainly not. [173]

Q. Do I understand, then, that such advances are made only if they are needed for picking and only if they are used for picking and these other purposes?

A. That is right, and I am certain that is what Mr. Smith told Mr. Fry, that he needed that much money to pick his fuggle hops. Otherwise it would not have been inserted in the contract. The fact when the contract was signed that the fuggle hops were picked did not make a bit of difference.

Q. Where does your certainty on this matter come from?

A. Since it is normal accepted practice and was carried on at all times.

Q. Have you any personal knowledge of this? Did you discuss this matter with Mr. Smith?

A. No.

Q. Were you present when the matter was being negotiated? Were you present when Mr. Fry was carrying on the negotiations?

A. I was not, but it is certainly the practice, and that is the reason I am answering you that way.

Q. Normal practice? A. Normal practice.

Q. Would it not be normal practice for Mr. Smith to use these advances in picking his clusters?

A. We do not supervise what a grower does with the funds after we advance money to him in good



(Testimony of C. W. Paulus.)

faith for the purpose intended. We do not hold him to an accounting for them. [174]

Q. Did Mr. Fry report to you that Mr. Smith was interested in a deal only if he could sell his fuggles and clusters together?

A. I got such a report from him. As a matter of fact, prior to the time I received a report on the telephone from another field man that Mr. Smith was interested in selling, but he didn't want to sell his fuggles alone.

Q. But you authorized Mr. Fry to make a deal with Mr. Smith on his fuggles and his clusters?

A. Yes, ultimately that is the case.

Q. Whose idea was it to split these up into two contracts, two pieces of paper?

A. I am sure I can't tell you that. I think Mr. Byers did that in the office.

Q. I believe you testified, Mr. Paulus, that on or about September 10th you forwarded one sample of Mr. Smith's clusters to Hugo V. Loewi, Inc., is that correct?

A. I read the exhibit in the record here a moment ago. I think on September 10th there were two samples sent to Hugo V. Loewi, Inc., one by express and one by airmail or air express.

Q. Then do I understand, Mr. Paulus, with reference to Exhibit 17, that immediately upon receipt of that sample Hugo V. Loewi, Inc., instructed you to notify Mr. Smith that Hugo V. Loewi, Inc., re-

(Testimony of C. W. Paulus.)

fused to accept such hops on contract? Is that correct?      A. Yes. [175]

Q. Did you so notify Mr. Smith that Hugo V. Loewi, Inc., refused to accept the hops on contract?

A. Not immediately upon receiving that telegram.

Q. Did you release Mr. Smith's contract so he could make another deal on his fuggles and his clusters?      A. No, sir.

Q. Is it customary in the hop trade, as you know it, Mr. Paulus, to reject a crop on the basis of a single sample prior to complete inspection?

A. I don't think it is. Complete inspection is generally undertaken prior to the time of formal rejection, although I believe you could reject on the basis of a sample.

Q. Such is the case here, is it not; rejection was made on the basis of one sample? Your instruction was to notify the grower that Hugo V. Loewi, Inc., refused to accept these 73 bales?

A. Yes, hops that run like that would not be acceptable. The inference may be that if the hops in that lot run to that sample, they would not accept them. That is the meaning of it and the intention as it came to me.

Therefore, following that an inspection was made and tenth-bale samples submitted to Hugo V. Loewi, Inc., for their final acceptance or rejection, which resulted in the rejection of the lot.

Q. Hugo V. Loewi, Inc., however, receded from

(Testimony of C. W. Paulus.)

the original position that they refused to accept the hops? [176]      A. No, they did not.

Q. But the formal inspection was gone through? Is that correct?      A. That is right.

Q. Was there anyone in Oregon at that time who had any authority to accept those hops?

A. No.

Q. As a matter of fact, at the time the inspection was made your orders were to reject them, is that correct?

A. If they run like the sample. However, I believe you will find correspondence in the file—at least, that was the case with other growers and I believe in the case of Kilian Smith—that tenth-bale samples were to be submitted for their final decision.

Q. But Mr. Oppenheim did not recede from his original position that he refused to accept them?

A. No.

Q. After you had been notified that Hugo V. Loewi, Inc., refused to accept the hops did Mr. Smith notify you of his selection of the growers' market price?      A. Yes, he did.

Q. What was the selected market price?

A. 85 cents per pound for cluster hops containing 8 per cent leaf and stem and 90 cents per pound for fuggle hops.

Q. Was that the growers' market price at that time?      A. Yes. [177]

(Testimony of C. W. Paulus.)

Q. Where did Mr. Smith take his 1947 clusters and fuggles?

A. He hauled them to the Oregon Electric warehouse in Salem.

Q. Was that place acceptable to the Loewi corporation?

A. Yes. A lot of hops are stored there.

Q. Was the time he took them there acceptable to the Loewi corporation?

A. As far as I know.

Q. You did take in his fuggles there, is that correct?

A. Yes, we received 59 bales of fuggles at the Oregon Electric.

Q. These documents that you had Mr. Smith sign, or this document, rather, permitting you to inspect his clusters, why did you prepare such a document? What was the purpose of that document?

A. The purpose was to have the growers stipulate with us, in the form of a letter, stating that our inspecting and handling and weighing and numbering on the head of these bales would not be misconstrued by him as an acceptance by us of his hops.

Q. In the absence of such a letter would those acts normally constitute an acceptance?

A. I don't know.

Q. According to the custom in the hop trade?

A. I don't know.

Q. Isn't it the normal custom in the hop trade

(Testimony of C. W. Paulus.)

that when hops are run across the weighing scales that they are the buyer's hops?

A. I heard it stated in the trial that they believe that is the [178] case, but I have never been so advised legally, nor do I know whether there are any suits that have so held.

Q. I am not asking you about that.

A. It is a matter of understanding.

Q. I am not asking you for your legal conclusion. I am asking you about the custom in the hop trade.

A. I don't even know whether it is a custom of the hop trade. It has been so understood.

Q. Did you obtain such a stipulation from Mr. Smith because you were afraid it would prejudice your position if you did not?

A. I don't know as that was the case exactly. It was to expedite the handling of the hops in the warehouse. That is really what prompted the whole deal, that even if the hops, even though rejected, had later been received on a spot purchase from Mr. Smith at a subsequent date, we could have settled with him on that purchase much easier if they had been weighed. The congestion in the warehouse at that time was terrific. There was a shortage of help. It also obviated the additional expense for rehandling, and it was those considerations that prompted us to get such a stipulation from Mr. Smith.



(Testimony of C. W. Paulus.)

Q. Had you ever used such methods in prior years to expedite the handling of hops?

A. Yes.

Q. At the time you had Mr. Smith execute this document were your orders to reject the hops? [179]

A. If—no, our orders were to send tenth-bale samples for Hugo V. Loewi, Inc.'s final consideration and decision.

Q. But at that time is it not a fact that Mr. Oppenheim advised you, in effect, that he did not intend to change his mind?

A. I can't recall any definite notification by letter or telegram to that effect, that he would not change his mind.

(Recess.)

Q. (By Mr. Dougherty): Did you have a chemical analysis made of Mr. Smith's cluster hops in 1947?

Mr. Kerr: I object on the ground that the question of a chemical analysis is immaterial.

The Court: He may answer.

A. I did not, personally. However, I submitted various samples, one of which was the Kilian Smith cluster sample, to Paul T. Rowell, Assistant Manager, United States Hop Growers Association, and he sent that to Oregon State College for analysis.

Q. Did you receive a report on those ten or eleven samples from Oregon State College?

A. Yes.

(Testimony of C. W. Paulus.)

Q. Did you have any analysis made in 1947 by Hopulon?      A. No, I didn't.

Q. Did any of your growers have any?

A. Not to my knowledge.

Q. Isn't that a recognized laboratory? [180]

A. Not to my knowledge.

Q. How about Schwarz?

A. I understand Schwarz is an Eastern laboratory, in New York City.

Q. Did you have any analyses made by Schwarz?

A. No, I didn't.

Q. Did your growers have analyses made by Schwarz?      A. Not to my knowledge.

Q. In prior years had you had chemical analyses made?      A. No.

Q. Never had chemical analyses made before, is that correct?      A. Not to my recollection.

Q. Have you ever heard of chemical analyses used in the trade?      A. No.

Q. Do you know whether or not breweries ever have chemical analyses made?

A. I have heard it stated that some breweries analyze hops which come to their brewery in its laboratory.

Q. Reading from Exhibit 24 in this case, which is a letter to you from Mr. Oppenheim, it states: "You refer to the brewing analyses made by Schwarz Laboratories and the Hopulon Corporation on the Murphy samples." What has that reference to?

(Testimony of C. W. Paulus.)

A. I might refresh my memory if you would hand to me the prior correspondence on that subject.

Q. Unfortunately, we were not permitted to see that, Mr. Paulus. [181]

A. Then I will answer by saying it is possible Mr. Oppenheim may have had some analyses of hops by those respective laboratories.

Q. By whom were those twelve analyses made at Oregon State College?

A. I don't know, Mr. Dougherty. However, the letter or report which I received came from Mr. Bullis, I believe.

Q. Do you know Mr. Bullis at the College?

A. Yes.

Q. Mr. Paulus, have you ever known of another occasion where a hop buyer has contracted to buy hops with a known defect such as mildew and has subsequently rejected the hops because of that same defect which he knew existed at the time he contracted to buy them?

Mr. Kerr: Just a moment. I missed the beginning of that question. Mr. Reporter, would you read the question to me?

(Last question read.)

A. There were other contracts made, Mr. Dougherty, on or about the time that the Kilian Smith cluster contract was made. However, what ultimately occurred in the settlement of those contracts I couldn't advise you right at this time. I

(Testimony of C. W. Paulus.)

will say, however, that this downy mildew attack which we had in 1947 at the blossom-bearing stage was something very unusual, and probably the first time that it has ever occurred, so that it was an unusual situation. [182]

Q. Can you say of your own knowledge whether or not Mr. Oppenheim and the Loewi corporation were fully advised as to that unusual condition?

A. Yes.

Q. At a time prior to the execution of these contracts?

A. I couldn't say whether it was at a time prior, but probably at about the time.

Q. Do I understand that Mr. Oppenheim was in Oregon about the 12th of August?

A. I believe he had just arrived.

Q. And that these contracts were executed—was it the 19th or 20th of August?

A. Thereabouts, the 17th or 18th or 19th.

Q. Were you at that time contracting all of the hops that you could, even though there was a considerable amount of mildew in the Valley?

A. No. We had only limited orders.

Q. What was the limit of your orders?

A. I couldn't recall now what it was.

Q. Isn't it a fact, Mr. Paulus, that on Mr. Oppenheim's instructions you were trying to buy up all the hops you could get?

A. No, that is not the case.

Q. Were you not out in the field trying to buy

(Testimony of C. W. Paulus.)

hops at that time? [183]           A. Personally, no.

Q. I believe that you have previously testified that you were out trying to buy hops and servicing contracts which you already had. Is that true or not?

A. I might qualify my previous answer. I made some purchases in the field, and through that particular week that you were just referring to, from the date of Mr. Oppenheim's arrival until the Smith contract was negotiated or signed, I was in the field inspecting yards most of the time.

Q. And during that time did Mr. Fry have standing orders to buy hops?

A. Limited orders.

Q. What was the limit on those orders?

A. Up to a certain amount, and I can't recall now what that was. Whether it was four or five hundred bales I can't recall.

Q. Or 1500 or 2000 bales?           A. No, sir.

Q. Or a thousand bales?           A. No, sir.

Q. Do you know, as a matter of fact, how many hops you did contract for during that period?

A. Which period, Mr. Dougherty?

Q. The period starting with Mr. Oppenheim's visit up until the 15th of September, when Mr. Oppenheim went out of the market and did not wish to buy any more hops, a period of approximately [184] a month.

A. I couldn't tell you how many hops we bought



(Testimony of C. W. Paulus.)

during that period now without referring to the records.

Q. Are those the records which we were not permitted to inspect, Mr. Paulus?

A. This is the first time I have heard you refer to them or ask any questions concerning other records.

Q. Is it not a fact that on advise of counsel you refused to permit us to inspect your records with respect to other growers?

A. I understood that as being samples.

Q. Was not the matter of records also covered?

A. No, not to my knowledge, Mr. Dougherty.

The Court: Go to something else while Mr. Kester is looking it up. Come on. Let's speed this up. We are dragging this morning.

Mr. Dougherty: Mr. Kerr, will you stipulate that you refused to permit us to inspect the records concerning other growers?

Mr. Kerr: Frankly, I don't recall what the discussion was, whether it was with respect to the records or samples. I recall the discussion of samples of hops handled for other growers, but as to records I don't recall what our discussion was.

Mr. Dougherty: With reference to Page 98 of the deposition, Mr. Kerr, I believe you there stated: "I would advise the witness that it is not necessary for him to answer questions at [185] this time relative to the transactions between Hugo V. Loewi, Inc., and the growers other than Kilian Smith

(Testimony of C. W. Paulus.)

with respect to the 1947 crop or other crop hops.”

Mr. Kerr: And the previous reference or the precise question which aroused that advice was this: “And did you make compromise settlements in any of those cases after rejection”? Whereupon we objected to going into the issue of compromise settlements with other growers, whatever they might amount to. We have no objection, your Honor, to bringing in all the records in Mr. Paulus’ office or Hugo V. Loewi’s office in New York, if the Court would find them helpful in determining these issues, but it has been our opinion that transactions between Hugo V. Loewi—

The Court: You don’t need to address me, Colonel. There is nothing before me on the subject.

Mr. Kerr: Yes, sir.

Mr. Dougherty: With reference also to Page 100 of the deposition, Mr. Kerr, that specifically refers to the correspondence and records.

Q. Mr. Paulus, with reference to Exhibit 16, which you have in your hand, is that a letter from Hugo V. Loewi, Inc., directing you to reject the Smith clusters?

A. Upon quick reading I don’t see any definite instructions to reject.

Q. What does it say with reference to the Smith clusters? [186]

A. The particular reference is: “We take the same stand on Lot 64, 73 bales Kilian Smith. We will not accept such hops.” And that is prompted

(Testimony of C. W. Paulus.)

by comparison with another sample which is described as dirty picked and blighted "and the quality of hops which we cannot deliver to our customers."

Q. Do I understand, then, that the two specific grounds on which Loewi said that they would not accept the hops were the grounds that they were dirty picked and badly blighted? Is that correct?

A. That is here so stated, yes.

Q. Did these hops run a 9-per cent pick?

A. That is my recollection, yes.

Q. Was that within the 10-per cent pick allowed by the contract?           A. Yes.

Q. Would you say, then, that under this specific contract these hops were dirty picked?

A. I would still say the hops were dirty picked but that that tolerance was permitted under the contract.

Q. Were these hops any more blighted than they had been when they were examined by your employee in the field?

A. I believe the testimony of Mr. Fry, my employee, was that there were good hops on the vines not injured by downy mildew and hops which were injured, and the samples so show. There are healthy burrs with good color in the sample, and then the downy mildew. [187]

Q. Does this contract refer to the entire crop of hops?           A. Yes.

(Testimony of C. W. Paulus.)

Q. With reference to Exhibit 22, Mr. Paulus, was it your opinion that the original sample which you sent to Mr. Oppenheim and on which he based his rejection was not truly representative of the crop?

A. I stated that "The early sample"—meaning one sample—"which was delivered to you"—meaning Hugo V. Loewi—"of this lot is in my opinion hardly representative of the entire lot." And I carried on: "An additional line of five samples of Lot 64 was airmailed to you today for your further examination and consideration."

Q. Was it then your opinion that that first sample was not representative of the entire lot? Is that correct?

A. My opinion is expressed as read from this letter.

Mr. Dougherty: Thank you, Mr. Paulus.

### Redirect Examination

By Mr. Kerr:

Q. Mr. Paulus, you have referred to orders which you had from Mr. Oppenheim to buy the hops for his firm. Were those orders for hops in the bale?      A. Yes.

Q. Were they orders to buy hops on the vines?

A. No. [188]

Q. Were they orders to buy mildew-damaged hops?      A. No, for prime hops.

Q. Were they orders to buy diseased hops?

A. No.

(Testimony of C. W. Paulus.)

Q. What quality hops were you directed by Mr. Oppenheim to buy for his firm?

A. Prime hops under his form of contract.

Q. In making advances to growers under the contract did you rely upon the representation of the individual grower as to what he reasonably requires for the purpose specified in the contract?

A. Yes, we do.

Q. What is your practice, the practice of your firm, in negotiating or preparing contracts to be executed by Hugo V. Loewi, Inc., relative to covering the fuggles and clusters in separate contracts?

A. Generally when a contract is made covering the production from the yard or yards of one grower, they have been in the past included in one contract. In 1947 and in the instant case of Mr. Smith and Geschwill, for some reason Mr. Byers, who is in my office, made two separate contracts, and I couldn't give you the reason why.

Q. When you advised Hugo V. Loewi, Inc., that in your opinion the first sample was hardly representative of the entire lot, being your letter to Hugo V. Loewi, Inc., which is Plaintiff's Exhibit 22, were you then hopeful that later samples would show [189] a better quality?

A. Yes, the first sample was taken early, and I believe was only one sample taken from one bale, or it may have been two samples out of one bale, and I hoped that subsequent more representative samples, or a larger line of samples, might show a different quality.



(Testimony of C. W. Paulus.)

Q. On that date the tenth-bale samples had not yet been drawn, had they, on September 20th?

A. I don't believe they had been drawn on September 20th, no.

Q. Have you ever purchased any hops from growers on the basis of chemical analyses of those growers' hops?      A. No, I have not.

Q. Were you at any time authorized by Mr. Oppenheim or Hugo V. Loewi, Inc., to buy for that firm any hops which had any defects under term contracts?      A. No.

Mr. Kerr: That is all. Thank you.

#### Recross-Examination

By Mr. Dougherty:

Q. Mr. Paulus, did you decide to draw up two separate contracts on Mr. Smith because the fuggles had already been picked?

A. I don't think that entered into it. I didn't know that the fuggles were picked at the time of signing the contract.

Q. Most of the fuggles in the Valley at that time had been [190] picked, hadn't they?

A. Not all of them.

Q. There were a few that had not been?

A. It is very possible.

Q. There were two separate contracts made because either you or Mr. Oppenheim had then decided that you would take the fuggles but intended to reject the clusters.

(Testimony of C. W. Paulus.)

A. Most certainly not. I testified before that that decision was made by Mr. Byers, and I didn't even know anything about it. I didn't see the contracts until after they were signed, as a matter of fact, by Mr. Smith.

Q. Were there any standing orders on that matter? A. On what matter?

Q. On this deviation from the ordinary custom of making one contract to cover both fuggles and clusters?

A. No, since it had been our office practice always to cover varieties of hops grown by a grower in his respective yards under one contract.

Q. Was the matter then solely within the discretion of Mr. Byers?

A. Yes. And upon reflection upon the subject right now I think what prompted him to do so, and what would have prompted me to do so was the fact that these riders regarding price and selection of fuggles and clusters was incorporated into one big rider, and I think he did it on that basis. That is my belief.

Q. Were those riders used on prior year contracts? [191]

A. I don't believe this particular form, since this had changed again from the manner of selection, and so on, and changed from previous years, I believe.

Q. You say that no one in your organization had any authority to buy hops with any defects. Did

(Testimony of C. W. Paulus.)

anyone in your organization have any authority to accept any hops at all?

A. The particular answer that I made to that question was regarding the purchase of hops for Hugo V. Loewi. We were authorized to purchase only prime hops under contract for Hugo V. Loewi, and upon advice from the office of Hugo V. Loewi during the fall of 1947 we were instructed that with reference to contract deliveries we were not to accept hops until the samples had been accepted by them. I believe that should answer your question.

Q. Were you ever permitted to exercise your own judgment, Mr. Paulus, as to whether or not you could accept any hops under contract for Loewi in 1947, or did all of your instructions come specifically from Loewi?

A. That year we were instructed to submit samples of all lots to New York for their approval prior to our acceptance of the lots.

Q. Was that a deviation from your ordinary practice?      A. Oh, slightly, yes.

Q. In prior years have you been authorized to accept hops under contract upon the exercise of your own judgment? [192]

A. Following submission of the type samples to Hugo V. Loewi and their acceptance of those type samples. Then we were asked to take delivery of hops and accept them providing they ran true to those type samples accepted by Hugo V. Loewi. In the instant case of 1947, however, Hugo V. Loewi

(Testimony of C. W. Paulus.)

desired that tenth-bale samples of lots be submitted to them following inspection for their final examination and acceptance or rejection.

Q. Did you advise Mr. Geschwill or Mr. Smith before these contracts were entered into that that practice had been changed?

A. I did not, since I did not receive such instructions until sometime early in September.

Q. Loewi changed the practice after these contracts were made; is that correct?

A. I wouldn't say it is a change of practice.

Mr. Dougherty: Thank you, Mr. Paulus.

Mr. Kerr: That is all.

(Witness excused.) [193]

### G. R. HOERNER

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kerr:

Q. Will you state your name.

A. G. R. Hoerner.

Q. You identified yourself and qualified, I believe, in connection with the previous case?

A. I believe that is true.

Q. Did Mr. Fry of C. W. Paulus' office deliver to you a sample of hops recently?

A. Yes. The sample I hold here, No. 64, was

(Testimony of G. R. Hoerner.)

delivered by him to me in my office in Corvallis on Thursday of last week.

Q. Had you been requested to make a separation of that sample with respect to mildew-damaged material and sound material? A. Yes, I was.

Q. By whom was that request made?

A. I presume by Mr. Paulus, through Mr. Fry.

Q. Were you directed by the head of your department at the College to make that separation?

A. No, I wasn't.

Q. Did Mr. Fry tell you what hops they were?

A. No. I simply had the sample by number.

Q. Does the sample as delivered to you by Mr. Fry bear a number? [194]

A. Yes, it bears Lot No. 64.

Q. Did you make such a separation?

A. Yes, I did.

Q. Will you explain to the Court the method that you followed in making that separation?

A. The original sample was opened. Approximately one-third of that sample was removed and weighed, and then three divisions were made with a Bates divider, which is the official equipment used by the Federal and State Inspection Service. The purpose for using that was to get a representative sample, so that the end sample which I examined carefully for leaves and stems, clean cones and infected cones, or parts thereof, consisted of approximately one-eighth—or approximately one-third of



(Testimony of G. R. Hoerner.)

the sample that originally was placed in this Bates divider.

Q. Excuse me. Is that Bates divider the same divider that is used by the Federal office in making the official determinations of leaf, seed and stem content? A. It is the same equipment.

Q. Very well. Will you proceed, please.

A. Following the choice of this eventual sample which was weighed, we actually separated the leaves and stems, the healthy cones and the diseased cones.

Q. How did you make that separation?

A. By hand.

Q. How did you determine which of the material in the sample [195] was healthy; that is, not affected by downy mildew, and which had been affected by downy mildew? A. Optical examination.

Q. Could you readily determine that by visual examination? A. Yes, I could.

Q. And what were the results of your separation in that manner?

A. If I may refer to my notes——

Q. You may.

A. I have a record of that here. The original weight of the sample was 15.2 grams; leaves and stems, 1.8 grams; clean cones or portions thereof, 2.2 grams; infected cones or portions thereof, 11.2 grams; per cent of infected cones, 83.58 grams.

Q. Now, by "infected cones" you mean infected by what? A. By downy mildew.

Q. Had you previously made an estimate purely

(Testimony of G. R. Hoerner.)

on the basis of viewing the top of the sample of the probably per cent of infected material?

A. Yes. My estimate from an optical examination of the surface of the broken sample was 80 per cent discoloration due to downy mildew.

Q. In your judgment was that method of determining the relative proportion of that sample which was affected by downy mildew a reasonably accurate method? A. I think so.

Q. Doctor, do you appear here as well as in the previous case [196] under subpoena?

A. That is true.

Q. Would you have performed a similar separation or inspection or determination for anyone who had requested it of you?

A. Very readily. I am a public servant. My services are open to anyone.

Q. Then you appear here under subpoena as a matter of public service? A. That is true.

Q. And you would for whoever might request it; is that right? A. That is true.

Mr. Kerr: That is all.

### Cross-Examination

By Mr. Dougherty:

Q. Where was that subpoena served on you, Mr. Hoerner? A. Here in Portland.

Q. Did you voluntarily come to Portland on the understanding that you would be given a subpoena when you arrived? A. That is true.

Q. Did you take this matter up with the head of your department? A. No.

(Testimony of G. R. Hoerner.)

Q. As I understand it, these hops ran a little bit better than the College yard in 1947; the College yard had about 97 per cent?

A. My reference to the College yard was to standing vines, not [197] to pressed samples.

Q. But the standing vines at the College yard showed about 97 per cent?

A. I think that was the figure I testified to, yes.

Q. Do I understand that in your separation here, Doctor, the so-called infected cone is a cone which shows any slightest trace of mildew?

A. That is the interpretation I used in examining these samples.

Q. Did you make any separation here separating out the nubbins?

A. No. They were considered infected, also.

Q. I see. So that pursuant to Mr. Byers' instructions you were not requested to separate——

A. No, I wasn't requested to make any separation of degree of infection.

Mr. Dougherty: Thank you, Doctor.

### Redirect Examination

By Mr. Kerr:

Q. Mr. Hoerner, will you please identify the several parcels that you have in your hand by their exhibit numbers.

A. I think there is no exhibit number here, Mr. Kerr.

Q. Hasn't that been marked?

A. I think it has not been marked.

(Testimony of G. R. Hoerner.)

Mr. Kerr: Will you place a mark in pencil on each package as you identify it, and it will then be marked by the Reporter. [198] I thought that it had already been marked with an exhibit number. Will you mark 57-A on one of those packages and explain what that is.

A. 57-A is the remains of the original sample as submitted to me. 57-B is the remains of the unused portion of that sample which went through the Bates divider. 57-C represents the clean cones and 57-D the infected cones—leaf and stem, 57-D, and 57-E the infected cones.

Q. Do the damaged or infected cones include what is known as nubbins or small—

A. Yes, all types of infection.

Q. Do the contents of that package include any substantial portion of such immature cones?

A. I could not state definitely. There are some there, certainly.

Q. Is Mr. Don Hill the head of your department?

A. No, he is not. He is head of the Farm Crops Department.

Q. You don't know whom Mr. Paulus contacted at the College in order to arrange for you—

A. Yes, Mr. Paulus contacted Dr. Hill, who in turn requested that I perform this service, which I agreed to do upon presentation of a subpoena.

Mr. Kerr: Thank you.

(Hop Samples above referred to were thereupon marked by the Reporter Defendant's Exhibits Nos. 57-A to 57-E, inclusive.) [199]

(Testimony of G. R. Hoerner.)

Recross-Examination

By Mr. Dougherty:

Q. Just one thing, Doctor: As I understand it, this is the second time in your years of experience that you have made such a separation; is that correct?

A. All three samples and separations at these two hearings were made at the same time.

Mr. Dougherty: I see.

(Witness excused.) [200]

HAROLD W. RAY

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Are you the Mr. Harold Ray who testified in the previous case?      A. Yes.

Q. Have you examined the samples of the Kilian Smith late cluster hops, 1947, Lot 64, which are in evidence here as Exhibit No. 52-A to 52-E, those being the exhibits or the samples——

A. Yes, I have examined the samples, those exhibit identifications which were purported to be the samples of the Kilian Smith 1947 hops.

Q. Are those the samples that are marked Defendant's Exhibit 52?



(Testimony of Harold W. Ray.)

A. 52-A to 52-E, inclusive, and also marked Lot 64.

Q. When did you make that examination?

A. I examined the five samples, those exhibit numbers, last evening at the adjournment of court.

Q. State with respect to each of the samples your opinion as to whether or not those hops were of prime quality when removed from the bale?

Mr. Kester: Just a moment. What samples?

Mr. Kerr: Will you state what samples you are now talking about?

A. I am talking about the five samples marked Exhibits 52-A to 52-E, inclusive, Lot or Sample No. 64, and the samples were marked Bales No. 10, 20, 40, 60 and 70.

Mr. Kester: My question, your Honor, is addressed to try to find out what samples these are. I mean, we have never seen them. We don't know where they came from. We would just like to know what samples they are talking about, where did they come from, and how did they get in the courtroom?

Mr. Kerr: They have been identified, I believe, by Mr. Paulus.

Mr. Kester: I don't recall that there was any reference made to them. I just want to know for information.

Mr. Kerr: I believe they are identified by the Reporter. I will have to put Mr. Paulus back on the stand for that purpose.

(Testimony of Harold W. Ray.)

Mr. Kester: Just tell us where they came from and what are they?

Mr. Kerr: These are tenth-bale samples which are taken from the Kilian Smith late cluster hops as testified to by Mr. Fry, sent from Mr. Paulus' office to New York, the New York office of Hugo V. Loewi, Inc., and then returned by Mr. Oppenheim from that office to this courtroom. Is that satisfactory?

Mr. Kester: Are they the complete samples, splits, or do they contain all the hops that were originally in them when they were sent to Mr. Loewi? If they have been clear back to [202] New York and out here again we would just like to have some assurance that they are proper samples. That is all.

Mr. Kerr: I think I had better put Mr. Paulus on the stand.

The Court: All right. Step down, Mr. Ray.

(Witness withdrawn.)

### C. W. PAULUS

was thereupon recalled as a witness in behalf of the Defendant and was further examined and testified as follows:

#### Direct Examination

By Mr. Kerr:

Q. Are you informed as to the nature of Exhibits 52-A to 52-E, being certain hop samples?

A. Yes.

(Testimony of C. W. Paulus.)

Q. Will you describe them.

A. The five samples submitted as Exhibits 52-A to 52-E are the original tenth-bale inspection samples taken from Lot 64 of the Kilian Smith 1947 crop clusters. Originally there were seven samples. Five are here as exhibits, all of them having been returned to my office by the office of Hugo V. Loewi. One of the samples returned—one of these tenth-bale samples which was returned by Hugo V. Loewi was submitted by me through Lamont Fry to Mr. Hoerner, and is in evidence here with Mr. Hoerner's exhibit number.

Q. That is 57-A, I believe. Can you identify 53-A to 53-G, being seven samples?

A. Those are the splits of the seven tenth-bale samples taken from the Kilian Smith crop upon the inspection which were retained in my office.

Q. Can you identify Exhibit 54-A to 54-G, seven samples?

A. Those are the original type samples taken from the Kilian Smith lot earlier in the season, prior to inspection of the lot as testified to.

Q. Can you identify 55-A to -F, six samples?

A. Those are the inspection samples of the Kilian Smith fuggle Lot No. 14, 59 bales.

Q. And Exhibit 56, one sample.

A. That is one type sample of the Kilian Smith fuggle lot, at that time estimated at 150 bales, which is the first sample removed from that lot and is our type sample.

(Testimony of C. W. Paulus.)

Q. Do you know where the one missing tenth-bale sample of Lot 64, the clusters, may be?

A. No, I do not.

Q. You don't have it?                      A. No.

Mr. Kerr: I guess that is all. [204]

### Cross-Examination

By Mr. Dougherty:

Q. Mr. Paulus, with respect to this Lot 52, or Exhibit 52-A to 52-E, have you any way of knowing if the hops returned in those wrappers are the same ones you sent to New York?

A. Do I have any way of knowing?

Q. Yes.

A. Well, I have no reason to think that they are not the original ones that were sent to Mr. Oppenheim.

Q. Do I understand you selected one of these samples to send down to Mr. Hoerner?

A. I took one of the samples—I didn't select it. I just took it.

Q. Was it a representative sample?

A. I believe that it is, yes.

Q. You examined them all and decided that that was representative; is that correct?

A. No, I think I just took one. I didn't even compare them.

Q. I see. So then you really can't say whether it was representative?

A. Well, it is one of the samples, one of the seven or five or six samples that I had.

(Testimony of C. W. Paulus.)

Q. And that was one of the six returned from Loewi; is that correct?      A. Yes. [205]

Q. Did they, the Loewi corporation, return the original type sample on the basis of which they rejected the corp?      A. Yes.

Q. Is that among these?      A. No.

Mr. Dougherty: Thank you.

(Witness excused.)

### HAROLD W. RAY

a witness produced in behalf of the Defendant, thereupon resumed the stand and was further examined and testified as follows:

#### Direct Examination

(Continued)

By Mr. Kerr:

Q. Will you now state, Mr. Ray, whether or not in your opinion each of the samples constituting Exhibit 52, or whether or not the hops in each of those samples was or was not at the time it was taken from the bale a prime quality hop?

A. It is my definite opinion that they were not prime quality.

Q. Why?

A. Principally because of the mildew damage.

Q. Will you describe the mildew damage in those samples.

A. Yes, I will. The mildew damage in these samples is materially different than the damage to the samples in the previous case. The hops in these



(Testimony of Harold W. Ray.)

particular samples were infected at a later [206] date of maturity than the others. These hops contained a very moderate quantity of nubbins, but there is a very general marking or discoloration of the cones. In other words, a material percentage of the cones is marked with downy mildew in each and every one of those five samples.

Q. Was that mildew damage readily apparent upon examining the sample?

A. Yes, indeed. Anyone could see it.

Q. Could there be any possible question in your mind as to the presence of that mildew damage?

A. No, absolutely none.

Q. Would you say that was a slight or a heavy mildew damage?

A. I considered it a heavy mildew damage, very much like my own hops were mildew-damaged. I would say almost identical.

Q. That is, by your own hops you refer to what?

A. I refer to 270-odd bales of my own production of 1947, which were rejected, or I rejected them myself, because of mildew damage which was practically the same as the damage to these hops. In other words, I mean that the infection occurred at about the same period of growth or maturity of the hop.

Q. Are those the hops that you referred to in previous testimony which you still have on hand?

A. Yes, I have.

Q. Those are 1947 hops of your production?

(Testimony of Harold W. Ray.)

A. Correct. [207]

Q. Is there any possible question in your mind as to whether or not any one of the samples that you have referred to would be rated as prime quality by any competent hop expert or examiner or grader?

A. I think there is no possibility of that, Mr. Kerr. The samples were quite uniform in appearance, and I don't think there would be any possibility of any hop expert grading them or any one of them as prime quality.

Q. Are the hops in those samples of good color?

A. Well, no. They are badly marked with mildew discoloration.

Q. Did you also examine——

A. The hops originally were of a yellowish color prior to their infection.

Q. Did you also examine the samples drawn by Mr. Smith from his late cluster hops, which are in evidence as Exhibit 35-A to 35-G?

A. I think I did, Mr. Kerr. I didn't note the exhibit number on those samples. I notice that they were marked Lot G-1260A, and the samples were numbered with bale numbers, 10, 20, 30, 40, 50, 60 and 70.

Mr. Kerr: Will Counsel stipulate that those are the samples which are in evidence as Exhibit 35?

Mr. Dougherty: Are these the ones over here, Mr. Ray?

A. Yes, those are the samples.

Mr. Dougherty: So stipulated, yes.

(Testimony of Harold W. Ray.)

The Witness: They were right here in front of the desk. [208]

Q. (By Mr. Kerr): You did examine those samples, then? A. Yes, I did.

Q. Will you state your opinion as to those samples.

A. Yes; my opinion on those samples is the same. Those appeared to be freshly-drawn samples; that is, recently drawn from the bale, and consequently they did have a somewhat fresher appearance. But the mildew damage or the marking of the burrs was approximately the same as it was in those other samples that I examined. I wouldn't say that they were any better in quality than the other samples that I examined. In fact, I found one that appeared to be worse than any of those others that I had examined. That was Bale No. 70.

Q. State whether or not, in your judgment, any of the samples in Exhibit 35 which you examined grades as prime quality.

A. In my opinion it could not.

Q. In your opinion could they ever have been graded as prime quality, those particular samples?

A. After the hops were baled? No, certainly not.

Mr. Kerr: That is all.

### Cross-Examination

By Mr. Dougherty:

Q. Did this mildew damage, Mr. Ray, penetrate the core of the hop?

A. In some cases it did, Mr. Dougherty, and in

(Testimony of Harold W. Ray.)

others it didn't. [209] In some hops the penetration was deep and in other cones the penetration was confined largely to the surface.

Q. Was it primarily a matter of discoloration of the petals?

A. Well, I wouldn't say primarily. Just as I said, some of the cones are marked very shallowly on the surface, and other cones are marked deeper.

Q. When did you make this examination, Mr. Ray?

A. I examined the samples on that table last evening.

Mr. Kerr: You are now referring to the samples which are Exhibits 52-A to 52-E?

A. 52-A to -E, yes, Lot 64, the samples marked Bales No. 10, 20, 40, 60 and 70, which I examined immediately after the adjournment of Court last evening. These samples—I don't remember the exhibit, but they are marked Lot G-1260A, Bale Nos. 10, 20, 30, 40, 50, 60 and 70, I examined this morning prior to the opening of Court.

Q. (By Mr. Dougherty): The first group, Exhibit 52, I understand you examined that under artificial light; is that correct?      A. I did, yes.

Q. What is your opinion of the color of those hops, Mr. Ray?

A. I examined the hops with respect to mildew marking, mildew damage only. The hops, judging by the samples I saw last evening—I couldn't state the original color very definitely, but I assumed that

(Testimony of Harold W. Ray.)

they were a yellowish-colored hop, and the examination of these other samples this morning confirmed that. However, [210] I could see the mildew markings in the artificial light just as plainly and distinctly as I could in the daytime.

Q. The purpose of your examination then was to determine whether or not there were mildew markings; is that correct?

A. Yes. I was grading the hops upon the basis of mildew markings, and it was my opinion that the hops were marked to an extent that would disqualify them as being a prime quality hop.

Q. Did you grade the hops on the basis of flavor?

A. No, no. I couldn't grade the hop on the basis of flavor. It is an old hop.

Q. On the basis of appearance of the lupulin?

A. That also would be discolored now, after over a year.

Q. On the basis of texture? Texture of the leaf?

A. That would be affected too. They dry out, you know.

Q. Would you characterize the hops as being large, flaky hops?

A. I would not, no. I would characterize them as just a mid-sized burr with some moderate degree of immature burrs that were damaged from mildew.

Q. The purpose of your examination was to determine whether or not there was mildew; is that correct?

A. The purpose of my examination was to de-



(Testimony of Harold W. Ray.)

termine in my own mind whether or not the hops were of prime quality or whether they could have been ever.

Q. You made that examination under artificial light; is that [211] correct, Mr. Ray?

A. I made one under artificial light and one in the daylight here, at this window.

Q. Different samples, however?

A. Yes, they were different samples.

Q. Is it the common practice in the hop trade to make examinations under artificial light?

A. It is, sir. That is, it is common under a certain type of artificial light.

Q. Is that the type of artificial light that you were using at this time?      A. I think not, no.

Q. Do I understand that on the basis of the inspection you made the only thing which prevented these hops from being prime was the mildew?

A. I presume that would be true, yes. The picking was not clean, but in listening to the testimony here, apparently the contract permitted that tolerance. And, therefore, these being old samples, I based my opinion upon mildew damage only, which in my opinion was sufficient to disqualify the hops as prime quality.

Mr. Dougherty: Thank you, Mr. Ray. [212]

#### Redirect Examination

By Mr. Kerr:

Q. Mr. Ray, did you re-examine these samples which are Exhibit 52 in daylight this morning?

(Testimony of Harold W. Ray.)

A. No, Mr. Kerr, I did not examine the samples that are Exhibit 52, but I did examine the samples this morning that were marked Exhibit 53-A to -G, inclusive, Lot 64. I don't know just what those samples are. They were bales marked—I think bales numbered 10, 20, 30, 40, 50, 60 and 70.

Q. What were your findings with respect to those samples marked Exhibit 53?

A. I found those samples practically identical in appearance to Exhibit 52.

Q. Are any of those samples of prime quality?

A. They were not, no.

Mr. Kerr: That is all. Thank you.

Mr. Dougherty: Thank you, Mr. Ray.

(Witness excused.) [213]

## HOWARD EISMANN

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Howard Eismann.

Q. Where do you live?                   A. At Salem.

Q. What is your occupation?

A. I am in the hop business.

Q. Are you a hop grower?           A. Yes.

Q. What hop farm or ranch do you operate?

(Testimony of Howard Eismann.)

A. Well, I operate the Golden Gate Hop Ranch at Independence and the Fort Vannoy Hopyard at Grants Pass, and I and my associates operate the Hermiston Farms, Inc., at Hermiston, Oregon.

Q. How long have you been in the hop business?

A. Oh, I started working in the hopyards as a boy about 1927.

Q. How long have you been engaged in the operation of hopyards?

A. My first experience as an operator was in 1937.

Q. Are you also engaged in buying hops from growers?

A. I am.

Q. In what connection? [214]

A. I have charge of the Oregon district for S. S. Steiner, Inc.

Q. How long have you been in that position?

A. Since February, 1940.

Q. In that connection has it been your duty to inspect, examine and grade hop samples?

A. Yes, it has.

Q. And have you inspected and sampled and graded hops in Oregon for S. S. Steiner, Inc.?

A. Yes, I have.

Q. Have you examined the hop samples which are in evidence as Exhibit 52-A to -E in this case?

A. Yes.

Q. When did you make your examination of those samples?

A. I examined those samples this morning.

(Testimony of Howard Eismann.)

Q. In daylight?

A. Well, on this table over here.

Q. Based upon that examination what is your opinion as to whether any of the samples is prime quality?

A. It is my judgment that they are not of prime quality.

Q. Why?

A. Primarily because of downy mildew infection.

Q. How does that downy mildew infestation or infection appear in the samples?

A. Well, there is several forms of it there. There is so-called [215] nubbins; there are some small cones where the downy-mildew infection has retarded their full development, and there are fully developed cones with blighted petals on them.

Q. How would you describe the extent of the mildew damage in those samples?

A. I would say they were damaged severely.

Q. Are those samples of hops of good color?

A. No, for the reason of the mildew.

Q. In your opinion, have those hops from the time they were first put in the bale ever been of prime quality?

A. No, because the downy mildew was on them before they were baled, and that condition does not change.

Q. Did you also examine the samples of hops which are in evidence as Exhibit 35-A to -G?

(Testimony of Howard Eismann.)

A. Yes, I did.

Q. When did you make that examination?

A. Yesterday afternoon during one of the recesses of this Court.

Q. And what is your opinion as to whether or not any of those samples is a sample of prime quality hops?

A. It is my opinion that they are not prime quality.

Q. Why?

A. For the same reasons exactly as I gave on the other samples.

Q. Did you note any material difference between the samples which are in evidence as Exhibit 52 and the samples which are in evidence as Exhibit 35 with respect to mildew damage? [216]

A. No, they run quite uniformly.

Q. Do you think that there is any room for doubt in the mind of any man who is a competent hop inspector or grader as to whether or not any of those samples would be the same as prime quality hops?

A. I don't see how there could be any doubt.

Q. Or as to whether or not any of those samples is a sample of hops of good color?

A. No, there could be no doubt about that.

Q. Would you say that the hops in those samples are fully matured hops?

A. Well, there are some fully matured hops. A good portion of them are fully matured.



(Testimony of Howard Eismann.)

Q. Are there some hops in the samples which are not fully matured? A. Yes.

Q. Could you tell the reason for the lack of full maturity of those hops?

A. On account of downy mildew stunting the full growth of the burr.

Q. Is the downy mildew damage on those samples readily apparent upon examination of the samples visually? A. Yes.

Mr. Kerr: That is all. Thank you. [217]

### Cross-Examination

By Mr. Dougherty:

Q. The Golden Gate farm that you mentioned, Mr. Eismann, who owns that?

A. It is a corporation, the Golden Gate Hop Ranch of Oregon, Inc.

Q. S. S. Steiner, is that one of the large hop dealers?

A. I presume they are quite large.

Q. Does the Steiner corporation have quite a few transactions with the Loewi corporation?

A. Yes, we have transactions with almost everybody in the business at some time or other.

Q. Almost all the other dealers in the business; is that correct?

A. Yes, and almost all of the other growers, or any growers, at some time or other during the period of years.

Q. These hops that you say you examined over on that table, did you take them over to the light?

(Testimony of Howard Eismann.)

A. No, because there was too much glare here this morning.

Q. Did you examine them for flavor?

A. For me, at any rate, it is impossible to judge what they might have been as fresh hops at the present time.

Q. You can't say now what they might have been when they were——

A. Not as regards flavor.

Q. Was the purpose of your examination to determine whether or [218] not there was any mildew?

A. No. They told me to look at the samples and determine whether or not they were of prime quality.

Q. Is it correct to say that in your opinion the only reason that they are not prime is that they have mildew?

A. No, I would say that they were too dirty picked also to be of prime quality.

Q. Are those the only two reasons?

A. The only two that can be determined at this time.

Q. Did you ever see Mr. Smith's 1947 clusters in the field?      A. No, I didn't.

Q. Did you ever see them in the bale?

A. No.

Q. So you have no personal knowledge of what the crop was like; is that correct?      A. No.

Mr. Dougherty: Thank you, Mr. Eismann.

(Testimony of Howard Eismann.)

Redirect Examination

By Mr. Kerr:

Q. Mr. Eismann, S. S. Steiner, Inc., is a competitor of Hugo V. Loewi, Inc., is it not?

A. That is correct.

Mr. Kerr: That is all. Thank you.

(Witness excused.) [219]

(Thereupon a recess was taken until 1:30 o'clock p.m. of the same day.)

Afternoon Session

Court reconvened at 1:30 o'clock p.m., January 28, 1949.

ROBERT OPPENHEIM

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Mr. Oppenheim, you testified in the previous case, the Geschwill case, did you not?

A. Yes, sir.

Q. You are the President of Hugo V. Loewi & Company, the defendant in this case?

A. Correct.

Q. Did you personally inspect the samples sent to the New York office of your concern by Mr. Paulus of the Kilian Smith 1947 late cluster hops?

A. Yes.

(Testimony of Robert Oppenheim.)

Q. Do you recall what samples your New York office received of those hops?

A. I think you have the records introduced. There were several [220] type samples and at some later date the tenth-bale inspection samples.

Q. Will you state why those hops were rejected by your firm on the basis of those samples.

A. Because they were badly damaged by mildew and wind whip. Also, on the first sample we received I considered them dirty picked. Later we had an analysis which showed 9 per cent.

Q. By an analysis you mean what?

A. 9 per cent leaf and stem by Government analysis.

Q. Is that the Hop Inspection Certificate?

A. Correct.

Q. When did you receive the notification of the official determination of the leaf, stem and seed content?

A. The certificate is dated the 15th. I think we were informed on the 20th by Mr. Paulus. I am not 100 per cent sure, but it was about that date. It was after we received and passed on the first type samples of hops.

Q. Then your first type sample that you received was received before you received the official Government certificate of the leaf, stem and seed content; is that right?

A. Yes, sir.

Q. Did you reject the Kilian Smith late cluster hops because of any difference in the market value

(Testimony of Robert Oppenheim.)

of such hops between the time when you contracted for them and the time that they were tendered to you for delivery? [221]

A. There was no difference in the market value at that time. The market was firm.

Q. Did you reject them for any other reason than the failure to come up to contract quality and condition?

A. For no other reason whatsoever.

Q. Did you authorize Mr. C. W. Paulus to buy any hops for you in 1947 on the vines?

A. No.

Q. Do you ever buy hops as hops on the vines?

A. Never.

Q. Do you ever buy hops other than baled hops?

A. Only in the bale. That is, we buy them on future contract calling for bulk delivery, but they are a processed product and we certainly don't buy anything but the finished product in the final analysis, because—I mean the analysis of the situation, not a chemical analysis. They have to be baled and they have to be sampled and passed on before we accept them.

Q. Did you at any time authorize Mr. Paulus to buy for you or for your firm any damaged hops on term contracts?

A. No. I am not in the habit of handling damaged hops.

Q. Did you at any time authorize Mr. Paulus to buy for you or for your account or the account of your firm any diseased hops on term contracts?



(Testimony of Robert Oppenheim.)

A. No, sir. The contract states what we are buying, prime hops, with the specifications duly set forth in the contract. [222]

Q. Did you give orders to Mr. Paulus in 1947 to buy Oregon hops for you? A. Yes.

Q. And what quality or grade of hops was specified in those orders?

A. As shown in the contract, prime hops. That is the usual method of buying hops before they are baled.

Q. Some reference has been made in the record in this case, Mr. Oppenheim, about some chemical analyses of the Murphy samples. A. Yes.

Q. Can you explain that?

A. Yes. Sometime in August I was out here and we had a contract with a grower by the name of C. W. Murphy, and McNutt-Murphy, which were two or three separate yards down in Harrisburg, and his hops showed considerable blight or mildew damage. So Mr. Murphy at our request picked a bale several weeks—probably two weeks before his regular picking, and he had one bale dried and baled for us and the samples sent, because we were curious to see, if possible, what damage had been done by mildew damage to the resin content of the hops. We didn't know; it was an experimental idea to get some bearing on the mildew damage in the State of Oregon.

Q. Had you contracted with Mr. Murphy for hops on the basis of any chemical analysis? [223]

(Testimony of Robert Oppenheim.)

A. No, sir. We had his entire crop contracted at 50 cents a pound. I don't know whether it is material or not, but we rejected them when they were in the bale on account of mildew damage, several hundred bales.

Q. What did you do with the tenth-bale samples of the Kilian Smith 1947 late cluster hops which were sent to your New York office by Mr. Paulus?

A. You mean what did we do when we received them?

Q. No, what disposition has been made of them, to your knowledge?

A. They were returned here, and they are over there on that bench, except one of them was missing.

Q. Are those tenth-bale samples which are in evidence in this case?      A. Yes, sir.

Q. You brought them personally, did you, into court?

A. No, they were sent by either mail or express to Mr. Paulus some weeks ago, if I am not mistaken. I don't know the exact date.

Q. The Bailiff will hand you some of the exhibits, Mr. Oppenheim. Will you refer to the first one, which I believe is Exhibit 17, a wire dated September 16th?      A. Yes, sir.

Q. Would you refer to that portion thereof bearing upon this case. [224]

A. I have to start a little above where it says about Kilian Smith, because it refers to that sentence: "Cannot use Lot 62, 31 bales." That was

(Testimony of Robert Oppenheim.)

another crop. "Notify grower we refuse to accept such hops on contract. Don't want them even at lower prices. Same applies to Lot 64, 73 bales Kilian Smith which we reject. Willing to accept his fuggles basis 90 cents for 8 per cent and apply cluster advances on fuggle settlement." I think I better read the rest of it. I think it is pertinent to this. "Also reject Kuenzi Lot 54, 39 bales. If he unable refund advances advise settlement you think can be made with him. We definitely will not accept these low-grade blighted dirty picked hops on contract."

Q. That telegram was based upon an examination of what sample or samples?

A. The type samples which were received. It is our habit to have our buyers send us samples just as fast as they are baled so we get an idea of the crop. That happens every year.

Q. When you examined the first type samples in New York, Mr. Oppenheim, was it your decision at that time absolutely to reject all of the Kilian Smith hops of whatever grade they might be?

A. Well, we would reject any hops that ran up to that type sample, and we presumed that these were fairly representative, although we couldn't tell until the hops had been properly inspected and graded out, because sometimes the sample will not be representative and a lot of times it will, depending on the size of the lot and how quickly it is picked and whether it is properly mixed.

(Testimony of Robert Oppenheim.)

Q. Will you refer to the next exhibit, which I believe is Exhibit 16. A. Which is that?

Q. A letter dated September 16th, is it not? That is addressed to——

A. C. W. Paulus, Salem, Oregon.

Q. Will you refer to the portion of that letter which bears upon this case.

A. I will have to read back a little, the same as in the telegram, because it covers more than one lot. "However, on Samples 62, 31 bales, Ralph Herr, we cannot accept such hops. The analysis is only 10 per cent, but the hops look a lot worse to us than that, and not only are they dirty picked but they are blighted and the quality of hops which we cannot deliver to our customers. We therefore wired you that we would not take this lot and to so notify the grower, as we do not want to take them in even at a discount in price. We take the same stand on Lot 64, 73 bales Kilian Smith. We will not accept such hops. We suggested that you close for his fuggles on the basis of 90 cents for 8 per cent and apply the cluster advances on the fuggles settlement."

Q. Will you read the next paragraph. [226]

A. "In dealing with growers like this, if they don't want to deliver the fuggles without the clusters we are perfectly satisfied, with such quality clusters, to have our money refunded rather than to be forced to take in any hops we do not want.

(Testimony of Robert Oppenheim.)

This is the positive position we will maintain on all such hops."

Q. Will you read the next to the last paragraph?

A. "I think you will understand our position, for, as I explained to you, we cannot load up with hundreds of bales of hops which are not deliverable to brewers and which would be extremely difficult to sell unless the buyers must have them.

"Our contracts definitely call for a prime quality hop, free of blight and disease, and clean picked. We can safely reject all these hops on all three counts. Where they have our money, we will have to negotiate for the best possible settlement, but we want you, if possible, to get advances refunded and call the deals off in such cases."

Q. Are those parts of the letter you read in respect to Kilian Smith?

A. Yes, it mentions Kilian Smith in the letter.

Q. Will you refer to the next exhibit, which is Exhibit——

A. 18?

Q. ——18.

A. You only want the part in reference to this case?

Q. Yes, refer only to the part or parts bearing upon this case. [227]

A. This is dated September 17th, and the last part reads as follows: "Sample 64, 73 bales, 9 leaf over 6 seeds." That is the Kilian Smith lot.

Q. Is that a copy of a wire which your office received from Mr. Paulus?

A. Yes.



(Testimony of Robert Oppenheim.)

Q. Refer to Exhibit 20.

A. Plaintiff's Exhibit 20: "Referring Samples 14"—that is Kilian Smith's fuggles—"and 64"—64 is Smith's lates—"Referring Samples 14 and 64 Kilian Smith, willing accept delivery Lot 14 fuggles, but again advise you positively refuse accept delivery 73 bales Lot 64 and instruct you to reject this lot and demand refund all advances or apply same on fuggle delivery." There is further in the telegram, but it is not pertinent, I don't believe.

Q. Is that a telegram?

A. There is more in the telegram I haven't read.

Q. Does it relate to this case?

A. No, sir.

Q. Now, do you have before you Exhibit 20, which is a letter?

A. Exhibit 20? That was Exhibit 20 I just had. This next one I have is Exhibit 22, a letter from Mr. Paulus.

Q. All right. Refer to the portions of that letter which bear upon this case.

A. This is from Mr. Paulus to our office: "We acknowledge [228] your several letters and telegrams of the 12th and 16th regarding Sample 64-73 bales Kilian Smith clusters hops. You have been informed that the hops grade 9 per cent leaf and stem." This is dated the 20th of September.

"The early sample which was delivered to you of this lot is in my opinion hardly representative of the entire lot. An additional line of five samples

(Testimony of Robert Oppenheim.)

of Lot 64 was airmailed to you today for your further examination and consideration.

“To date I have not contacted this grower regarding any settlement since he gave his price selection over the telephone, which was passed on to you by wire.

“Kilian Smith is a relative of the Banker Smith family in the St. Paul section and has been a buyer of hops for a number of years for other dealers. I feel, therefore, that we will have to work out our final decision for action with him carefully and be on safe ground in any event.

“I am still hopeful that upon re-examination of these samples you might see your way clear to accept these hops on some basis and indicate to me a reasonable firm price at which you can accept the cluster hops. Yours very truly.”

Q. Do you recall that that was the first word you had from Mr. Paulus that the samples you had previously received might not be truly representative of the entire lot?      A. Yes. [229]

Q. Will you examine the next exhibit in order there, Mr. Oppenheim.

A. This is my letter, copy of my letter of the 22nd.

Q. That is Exhibit 24, is it?

A. This is, yes, Plaintiff's Exhibit 24. That is right.

Q. All right. What is the date of that letter?

A. September 22nd.

(Testimony of Robert Oppenheim.)

Q. That is addressed by you to Mr. Paulus; is that right?      A. That is correct.

Q. Will you refer to the portions of that letter which bear upon this case?

A. "Dear Sir: Your various letters and samples have come to hand this morning.

"Before answering any of your letters in reference to any specific lot, let me state that we will take in, in due course of business, all hops, either fuggles or clusters, which grade prime, but we will not"—that is in large type—"take in any hops which run off-grade until each and every lot is separately inspected and graded and we have tenth-bale samples from you to show us what we are getting. It is not a question of the good will of any particular grower, as we will try in every way to cooperate with both you and the grower, but we are not going to accept a lot of hops which we cannot deliver to our customers.

"We refuse to tie ourselves up with hundreds of bales [230] of very poor hops or make any adjustments on any contract delivery until we know what we are getting and what we can do with such hops. This goes for Banker Smith's family or any other influential or non-influential hop grower in the State of Oregon. It is our money that is being jeopardized, and we have no intention of being forced into any quick deliveries or acceptances."

Q. Now, was that reference in that letter a reference to the letter which you previously read from Mr. Paulus to you?

(Testimony of Robert Oppenheim.)

A. Yes. It evidently is in answer to his letter of the 20th, September 20th.

Q. Are there any other portions of that particular letter which are pertinent?

A. The bottom paragraph on this page: "Regarding the Kilian Smith lot, the fuggles are, in our opinion, definitely slack. The lates we do not like at all. They are very poor quality. If you want to arrange to have these hops inspected and graded, and advise us if they are in sound condition, you may do so, and after we have seen tenth-bale samples we can see what can be done. However, we are making no promises regarding acceptances of such hops."

I think that is about all that covers Kilian Smith.

Q. The next exhibit, Mr. Oppenheim.

A. Our wire which we sent on November 25th at 3:33 p.m.

Q. November 25th? [231]

A. September 25th. Do you want me to read that?

Q. What is the exhibit number?

A. I don't see anything here that indicates it.

Q. We will pass that by, Mr. Oppenheim. What is the next exhibit?

A. Exhibit 22, Plaintiff's Exhibit 22. Do you want that read?

Q. What is that?

(Testimony of Robert Oppenheim.)

A. It is a telegram which we sent to C. W. Paulus on September 30th.

Q. Are you sure you have the correct exhibit number?

A. It says Plaintiff's Exhibit No. 22. Then there is something on the bottom, Plaintiff's Exhibit 26.

Q. When you refer to the exhibit number be sure and check it with the number 4083 which appears above it. This is Exhibit No. 26; is that right?

A. Yes.

Q. How does that relate to the Kilian Smith hops?

A. Well, I would like to read it, if I may.

Q. Very well.

A. "Referring to samples which we have accepted as being satisfactory for delivery, we caution and instruct you to inspect all lots carefully and throw out any bales which do not run fully up to samples or are in your opinion not a prime delivery. We consider hops containing considerable blighted burrs as unsatisfactory delivery." [232]

Q. That was a telegram addressed by you to C. W. Paulus on September 30, 1947?

A. September 30, sent from New York at 12:01 p.m.

Q. What was the prevailing market price for Oregon late cluster hops at that time?

A. 85 cents for prime hops.

Q. Will you examine the next exhibit, please.

A. This is Exhibit 28, dated October 16, from



(Testimony of Robert Oppenheim.)

New York to Paulus: "Received tenth-bale samples Lot 64, 73 bales Kilian Smith clusters. These hops blighted and off-grade, dirty picked and not prime delivery. Reject and secure refund of advances."

Q. Are those the first instructions you gave to Mr. Paulus relative to the Kilian Smith hops after you had received and examined the tenth-bale samples of his hops?

A. Yes. We evidently received them that morning, and I presume that afternoon we went through them. I am surmising that, however.

Q. What was the prevailing price between dealer and grower?

A. Still unchanged; 85 cents for prime hops.

Q. That was on October 16th that it was unchanged? A. Yes, sir.

Q. Will you refer to the next exhibit.

A. Exhibit 29.

Q. 29?

A. That is also dated October 16th.

Q. Is that a letter?

A. This is a letter to Mr. Paulus: "Dear Sir: We have just [233] received and gone through seven samples of your Lot 64 representing 73 bales of the Kilian Smith crop of cluster hops.

"These hops are badly blighted, off-grade, dirty picked and not a prime delivery.

"We are therefore compelled to reject them under the terms of our contract, and request that you so

(Testimony of Robert Oppenheim.)

notify the grower and demand refund of our advances."

Q. That is a confirmation, is it, of the telegram of the same date that you previously read?

A. Yes. It has one added paragraph there, I believe. Well, it is a little more specific; that is all.

Q. What do you mean by the term "off-grade" as used in that letter?

A. Not a prime hop.

Q. Will you now refer to the next exhibit, which I believe is 30?

A. That is right. The bottom part of the telegram, which contains other matters: "Try arrange prompt delivery Kilian Smith fuggles and deduct cluster advances as cannot use clusters and positively reject." This is dated the 22nd of October.

Q. Will you refer to the next exhibit.

A. Exhibit 31, copy of a telegram sent by Mr. Paulus, Salem, Oregon, October 22: "Kilian Smith reported twentieth had not delivered his 20,000-pound fuggle contract to Seavey. He still interested sell these hops since Seavey delivery appears doubtful [234] and buyer encourages sale. Your purchase these hops may ease settlement your cluster advances and also expedite delivery your fuggle contract and shipment which now delayed pending Seavey action." I think there is an answer to that in 32.

Q. And your next exhibit is 32.

A. Telegram from us to Paulus, the same day—

(Testimony of Robert Oppenheim.)

no, the 23rd, the next day. The other evidently was a night letter and received on the 23rd in New York. "Not interested buying Kilian Smith fuggles. Make every effort to arrange with him to set aside 20,000 pounds for Seavey delivery and deliver balance to us to clean up our contract. We stand on our rejection clusters and insist upon repayment cluster advances from balance money due on fuggles."

Q. Does that where you have just read constitute your reply to the previous day's wire which you read from Mr. Paulus?

A. Yes, sir; undoubtedly.

Q. Now the next letter, which is Plaintiff's Exhibit 34, you need not read that.

A. You want me to read that?

Q. No. State whether that was intended as a confirmation of your wire of the same day which you did read?      A. Yes.

Q. Do you have Exhibit 50 there?

A. Yes, sir.

Q. What is that? [235]

A. This is a copy of a letter from Mr. C. W. Paulus dated—this is the office copy, I would say, of it.

Q. Is that a copy of a letter which you received?

A. Yes, undoubtedly we must have it in our files.

Q. From Mr. Paulus?

A. Yes. You want me to read it?

(Testimony of Robert Oppenheim.)

Q. Yes, please.

A. "We were able to make settlement with Kilian Smith on the basis of your request and have taken delivery of his 59 bales fuggles and have applied the proceeds against all of the advances, both fuggle and cluster crops which were due." Then further in that paragraph there is something which has no bearing on the Kilian Smith matter. I have another exhibit here which doesn't seem to be pertinent.

Q. What is the number of that?

A. 49. It simply states the same thing over again.

Q. Exhibit 49 is a letter confirming—that is a letter from whom?

A. From us to Mr. Paulus.

Q. And what is that letter?

A. Well, after the first paragraph here: "Referring to your letter of the 20th in reference to the Kilian Smith lot, as we wired you today, you are instructed"—that simply instructs and is a confirmation of our wire about the fuggles.

Q. Very well. Do the correspondence and telegraphic exchanges [236] which you have read state the actual reasons for the rejection by your company of the Kilian Smith late cluster hops?

A. I think they say so in the strongest possible language.

Q. And do they correctly state the actual reasons for that rejection?           A. Yes, sir.

(Testimony of Robert Oppenheim.)

Q. Was any of that correspondence or any of those communications communicated with any idea of a possible lawsuit over those hops?

A. None whatsoever. We never had a lawsuit in our history until these present two cases. I am not in the habit of preparing for lawsuits. I have been in business forty-eight years without one.

Q. Do you acknowledge that the rejection of hops is ordinarily a rather tragic matter for both—

A. It is something we hate to do. Until we had this situation in 1947, of the tremendous damage to the quality at picking time, we had never had any rejections that, as I testified I think in the Geschwill case, amounted to a row of pins, except maybe an occasional odd bale of hops that were damaged in the handling, or high-dried or slack-dried, which is expected in any business transaction in hops. I might add, Mr. Kerr, we buy hops for delivery to our customers. We don't buy them to reject them.

Q. Could you have delivered those hops to your customers under [237] a contract that required prime delivery?

A. Not blighted hops. They were so bad the brewing value is definitely low, although I couldn't tell you how low because, as I say, we don't sell hops on any chemical analysis. But any competent judge of hops knows that when hops are blighted they have lost some of their value, and they have certainly lost their looks, and they have lost some of their flavor. The blighted ones, the burrs may be



(Testimony of Robert Oppenheim.)

perfectly fine, but the blighted ones are definitely off-quality for flavor.

Q. Have you experienced a definite dislike by brewers of diseased hops or blighted hops?

A. Well, after all, the brewing industry is highly competitive, and practically every brewer stresses the point that he buys only the best materials, and I don't think any of them would at any time want to be accused of buying off-grade hops. They may have taken them of necessity when they couldn't get anything else during a scarcity of hops during the war period, but in the normal course of events our customers don't want anything but the very finest hops we can secure for them. And I think that goes for the entire brewing industry and other dealers as well as myself. We are not specialists in any better than ordinary hops. We are handling the same hops as the other people do.

Q. Have brewers indicated to you that they fear that hops affected by mildew might affect the flavor of their brew? [238]

A. Well, I don't recall any specific instance, but I know that the minute I do submit some off-grade samples the brewmaster or the boss would throw them up to us and say, "I am not going to use those"—I was going to use a cuss word—he would say, "We can't use such hops for our beer. We would spoil the beer."

Mr. Kerr: That is all, Mr. Oppenheim.

(Testimony of Robert Oppenheim.)

Cross-Examination

By Mr. Dougherty:

Q. Mr. Oppenheim, do I understand that along about August, 1947, it looked to you as if you would be short on your contracts?

A. I would say that some of our deliveries on our contracts would be short, because the yards indicated that they would be unable to pick all the hops. We had definitely some short deliveries on our contracts, and we were definitely assured at that date that a lot of hops—for instance, the Murphy hops that I mentioned before—would not be suitable for prime delivery to our customers. We knew we couldn't dispose of those hops to our customers on our contract demands. We have to deliver good hops to our trade.

Q. Do you sell your hops to brewers as prime hops?

A. Well, we call them prime hops, or we often call them choice hops, too. A choice hop, as I have always understood, to a [239] brewer is the same as a prime hop on the Pacific Coast, because there is no fixed standard, no Government standard. We are an old-time house, and that was customary when I was a boy and got into business. Our concern always called them choice. Other people call them prime. It is just a matter of custom.

Q. There are no fixed standards for these terms?

A. Pardon me?

(Testimony of Robert Oppenheim.)

Q. There are no fixed standards for these terms?

A. No, sir.

Q. Why did you decide to buy some additional hops in Oregon in 1947?

A. Well, I believe at that time it was impossible to buy anything in Yakima or in California, I believe. I believe the crop was practically sold out. That is my recollection.

Q. Almost completely contracted; is that correct?

A. That is correct.

Q. When you were here in 1947, Mr. Oppenheim, did you know that there was downy mildew in the Valley?

A. It was apparent to anybody with eyesight.

Q. Were you out looking at some yards with Mr. Fry, who testified here today?

A. I think I testified in the Geschwill case that I covered a great part of the Valley here, and I was taken out by Mr. Paulus and I am sure once or twice by Mr. Fry. I would say Yes, to the best of my recollection. [240]

Q. Do you recollect Mr. Paulus mentioning the matter of the Smith fuggles and clusters to you at that time?

A. Not definitely; no, sir. All I know is that I gave him orders to buy a few hundred bales additional of hops, and we agreed to take clusters as well as fuggles. That is the best of my knowledge. But the Kilian Smith lot, as far as I can recollect, was never specifically mentioned.

(Testimony of Robert Oppenheim.)

Q. Were you primarily interested in obtaining fuggles?

A. Fuggles in preference to clusters, because the fuggles were free of disease. But we take more clusters or handle more clusters than we do fuggles, as a rule.

Q. The fuggles, as I understand it, are most resistant to mildew; is that correct?

A. Yes, sir; I would say that the fuggle crop was practically free of disease, free of mildew damage.

Q. Did you contract some additional clusters in the case of growers who wanted to sell both their fuggles and clusters together?

A. Well, I don't know without referring to the records. The only two I would know at the moment were the Geschwill and the Kilian Smith. There may have been others. I wouldn't state "Yes" or "No" because I don't know at the present time without referring to the records.

Q. Did Mr. Fry or Mr. Paulus report to you that there was mildew in the Smith yard? [241]

A. Not that I can remember.

Q. Did you know that there was mildew generally in yards in that area?

A. Yes, but there were a lot of yards that were practically free of downy mildew. There were quite a few yards in Oregon that produced prime cluster hops. We took a lot of them in ourselves.

Q. Did you ever examine Mr. Smith's hops in the yard?      A. No, sir.

(Testimony of Robert Oppenheim.)

Q. Did you feel free to do so had you wanted to?

A. I presume I was at liberty to go anywhere in the state. Nobody ever kept me out of a hop-yard yet.

Q. It is common practice, isn't it?

A. Yes, it is common practice to go in and out of the hopyards without even asking permission. We would drive in and around and out.

Q. Did you ever examine Mr. Smith's hops in the warehouse?

A. No, sir. I never saw the bales. I have never seen any of them except the samples that were sent to New York. Please remember that in September, October and November I am a pretty busy man in New York, because we have to make our deliveries, we have to take care of our finances—that is our busy season. It is all one big peak. We do most of our business in three months. Practically 95 per cent of our whole year's business is done in three months. [242]

Q. Do I understand, then, that you never talked to Mr. Smith about this?

A. No, sir; I have never seen him until I saw him in court here. That is, to my knowledge. I may have seen him and not known him.

Q. I would like you to look at Exhibits 43 and 45-A, if you will, please, Mr. Oppenheim, and after examining those will you tell us when you first received a type sample of the Kilian Smith 1947 clusters.



(Testimony of Robert Oppenheim.)

A. Well, both these sample advices from Mr. Paulus are dated the 10th of September, and one is marked received on the 12th in pencil here, evidently put on by Mr. Sheridan. That looks like his handwriting to me. So the sample of Lot 64, one sample, Lot 64, representing 73 bales of clusters, 1947 Kilian Smith crop, so marked on there, that was received on the 12th, and the other sample by express on the 14th.

Q. The 14th of what month?

A. Of September.

Q. Of September, Mr. Oppenheim?

A. It says 9-10-47. There is evidently some mistake on this, because the sample notice is marked September 10th, and it has on the bottom, "Received 10-14," which evidently is a clerical error. Anybody can make a mistake like that, I would say. We certainly didn't receive these hops a month later. It doesn't take that long to get to New York. [243]

Q. Is there a notation by Mr. Sheridan at the bottom of that which might indicate——

A. There may be: "This package was held up by strike." Oh, I guess maybe it is correct, then. There was an express strike at that time, now that I see that notation. I wouldn't have believed it otherwise. So we only received one sample, then, instead of two at the time in early September. That is correct. This proves that and refreshes my memory.

(Testimony of Robert Oppenheim.)

Q. On examination of that one type sample which you received was it your impression at that time that the hops were dirty picked?

A. Yes. I definitely wired that and I explained it to Mr. Kerr a while back.

Q. Although the official analysis showed 9 per cent?

A. We didn't know the official analysis until later. And very often, I may state, our judgment varies from the actual out-turn on analysis. Some times we think they are cleaner picked than the analysis shows, and sometimes we think they are dirtier picked, but we have to be bound as far as our contracts are concerned by the official analysis as stated in our contracts.

Q. But, as I understand, the 9 per cent pick under this contract was permissible?

A. It was permissible. There was an 8 per cent contract with tolerances up to 10 per cent, and a deduction of one cent each one per cent additional leaf and stem. That is the common form [244] we have been using in the last year or so.

Q. Then, as I recollect, it was on September 16th that you sent your telegram of rejection; is that correct?

A. I think that is—yes, that is the date. I am sure it is.

Q. That was before you had received the official picking analysis?

A. I think I have already testified before that

(Testimony of Robert Oppenheim.)

it was on the 20th that we had a wire from Paulus.

Q. Is it your practice to reject hops before they are tendered on the basis of one type sample, Mr. Oppenheim?

A. Well, I wouldn't call it a rejection. It is simply that we reject on the basis of that sample, because that is, as I testified, a type sample and the word "type" does more or less express—it is supposed to represent the entire lot, but until they are actually examined bale for bale I would not consider a type sample as representative of the entire lot. That would be a very unfair position to take.

Q. In your opinion that would be unfair?

A. Yes, but, nevertheless, a type sample may show—may be representative of the entire lot.

Q. Then do I understand in your correspondence with Mr. Paulus, when you used such terms as "We absolutely reject," or "We positively refuse to accept"—

A. On the basis of those samples, yes. If the hops ran like those samples we don't want them, period. [245]

Q. So, as I understand it, at the time that there was a complete inspection of the hops in the warehouse your orders were to reject them?

A. Pardon me?

Q. At the time that the hops were actually inspected in the warehouse your orders at that time were to reject them?

A. Not until we had passed upon the tenth-bale

(Testimony of Robert Oppenheim.)

samples in New York, and I think the correspondence clearly shows that.

Q. You made that decision, did you, after Mr. Paulus had urged you to make a fair settlement in the matter?

A. Mr. Paulus as a buyer is in a position of trying to make the best possible settlements for the growers who are, after all, his bread and butter. Naturally he urges us to make the best possible settlements in the interests of—in our own interests and in the interests of the growers, and I think that is the position that anybody who is in the middle is bound to take if he wants to keep the respect of both parties.

Q. You said that the brewing value of these mildewed hops was impaired because they were mildewed.

A. Well, a mildewed burr is shriveled up, or partly shriveled up—I don't say that the brewing value of the completely matured cone which is a little red on the outside is seriously hurt, but any damage more than that superficial damage, as you might call it, is definitely impairing the brewing value of the sample. Now, a comparison of those impaired hops would determine [246]—the percentage of impairment of each blossom or burr would determine how much the brewing value might be damaged. But that is something that I can't testify to except that it is common sense. That is all I can tell you about that.

(Testimony of Robert Oppenheim.)

Q. What was the result of the Schwarz analysis of the Murphy mildewed hops?

Mr. Kerr: May our previous objection to that line of testimony be applicable to this question?

The Court: You may answer, subject to the objection.

A. I haven't got any record of that with me. I don't remember, but it was definitely impaired as compared with a prime, fully matured, ripe hop.

Q. (By Mr. Dougherty): Is the brewing value a matter subject to chemical analysis?

A. Only as to the resin content, the Alpha, Beta and Gamma resins in the hops. I am no brewmaster, I am no chemist, but I am just an old-time hop man. We go by looks and flavor and things like that. I can't testify as to any technical end of that. I wouldn't presume to.

Q. On this matter of flavor, do I understand that the flavor is usually produced by these resins? Is that correct?

A. Well, I don't know. I couldn't say "Yes" or "No." There are volatile oils in the hops which also probably have something to do with the flavor. I don't know. Again, I couldn't give you any better answer than that. [247]

Q. Is this resin in the lupulin? Is that correct?

A. Well, the lupulin contains—probably there is a greater portion of the resins. Again, I qualify my answer that I don't know positively, just hear-



(Testimony of Robert Oppenheim.)

say and from experience, going around to the brewers and hearing conversations; and beyond that I don't know.

Q. It is a matter that brewers do know about and take some interest in; is that correct?

A. Some brewers don't make any examination. I would say the bulk of the brewers—I think there are about 420 active brewers in the United States, and I would say probably 300 or 320—this is again a guess on my part—make no chemical analyses of their hops. There are certain concerns that make laboratory tests, undoubtedly.

Q. I believe you said the other day—correct me if I am wrong—that some of the larger brewers and growers maintained their own laboratories?

A. I would say that all of the larger and some of the smaller ones have their own laboratories. It is becoming more and more so.

Q. I believe that in your correspondence the stated ground for rejecting Mr. Smith's clusters was that they were badly blighted.

A. Well, badly blighted means mildew damage. It is the blight from the mildew.

Q. You were here when Dr. Hoerner testified?

A. Yes, sir.

Q. He testified that any burr which showed the slightest trace of mildew on one petal was in his classification an infected burr. Now, do I understand you to say that such a burr, where there is just a slight trace of mildew on a petal, the brewing quality of that probably would not be affected?

(Testimony of Robert Oppenheim.)

A. That would be my judgment, that the hop outside of a little discoloration on the outside is not seriously damaged. If they were all like that, the damage would be considered very slight and probably would not impair the value of the hops or the brewing value, as you express it.

Q. You stated, I believe, in some of this correspondence that you read, Mr. Oppenheim, that it was your money which was being jeopardized.

A. Well, I mean our money, the corporation's money, in which I am the principal stockholder. I sort of consider it my own business.

Q. But actually in this case you took that money back from Mr. Smith, didn't you?

A. Yes, but only because he returned it. We gave it to him, and he is welcome to it at any time he wants it. It is there ready for him. At the present time we feel we owe Mr. Smith some three or four odd hundred dollars, whatever the exact amount of that check is. We definitely have that as a liability on our books. We will be glad to pay him the money tomorrow [249] if he wants it.

Q. On that check it says "Balance on contract delivery 59 bales of fuggles."

A. That is in line with the letter which Mr. Paulus sent us. He made settlement on that basis, and that was a complete settlement of the contract, so I understand.

Q. Have you ever offered Mr. Smith a check in the same amount not bearing such a prejudicial notation?

(Testimony of Robert Oppenheim.)

A. I couldn't answer that. Possibly Mr. Paulus has, but I don't think so, because he refused to take it and the next thing we knew we were notified we were being sued. This matter is out of my hands, you might say. I mean then I have to get my own attorneys to protect my own interests.

Q. In connection with that, Mr. Oppenheim, isn't it a fact that on or about November 24th, 1947, you received a letter setting forth Mr. Smith's position?

A. I believe a letter from your concern.

Q. Did you ever reply to that letter?

A. I don't know. I referred it to my attorney, and from then on I don't know what happened. I couldn't testify, because my recollection isn't—

Mr. Kerr: I wonder if Counsel will stipulate that Mr. Shields of Counsel's office and myself, as counsel for the defendant, conferred in response to that letter, and with respect to this particular check agreed that it would be stipulated and understood that [250] the defendant was making a continuing tender of the amount of the check, which is Exhibit No. 9 in this case.

Mr. Kester: A continuing tender subject to the terms stated on the check.

Mr. Kerr: Nothing was said about terms.

Mr. Dougherty: Will you tell us when this conversation was, Mr. Kerr?

Mr. Kerr: I don't have the office record with me. I could determine that. So could Mr. Shields.

The Court: Continue with the examination.

Mr. Dougherty: Thank you, Mr. Oppenheim.







(Testimony of Robert Oppenheim.)

Redirect Examination

By Mr. Kerr:

Q. Mr. Oppenheim, if making a term contract or contracting for hops to be harvested and baled from a yard in which there is some mildew at the time the contract is made is to constitute an obligation by the buyer under that contract to take mildew-damaged hops, would you make term contracts on Oregon hops?           A. I should say not.

Q. Why not?

A. Well, because we would be obligating ourselves to take hops which we couldn't handle to our customers. We would go broke in a year or two if we did that. [251]

Q. Does the appearance of the hops affect the marketability of those hops to brewers?

A. Definitely.

Q. Does the presence or evidence of damage by mildew infestation affect the appearance of those hops so far as the brewer's buyer is concerned?

A. Oh, absolutely, because, as I have already testified, probably the greatest portion of hops sold, when sold on actual sample, are picked out by samples tendered to brewers, and the first thing they do, if they see a hop which looks bad, they shove it aside and say, "Can't use it in my beer; it would spoil it."

Q. Now, if a brewer notes some mildew damage in a sample of hops which you tender to that brewer as a sample of possible delivery, what has been your

(Testimony of Robert Oppenheim.)

experience with respect to the reaction of that brewer to that sample?

A. I think my last answer covered that.

Q. Has that brewer become suspicious of possible further damage?

A. I would say that in 1947 the market was high, and the cause of the rapid rise in the market was the extent of mildew damage, which was widely broadcast throughout the entire brewing trade. I think the brewing industry was alert to mildewed hops, and scared to death of them, afraid they might spoil their beer and their reputation.

Q. You referred to laboratory tests made by some brewers of [252] hops which they used in their brew. Do you know whether or not those laboratory tests are for the purpose of determining the hop ratio; that is to say—

A. Well, that would be one of the reasons for it, because they use a certain amount of hops per barrel, which varies with every brewer. I presume that the large brewers probably regulate the use of their hops by laboratory examinations of the hard and soft resins, the Alpha, Beta and Gamma resins, and if they have hops that run excessively high in resins they would use less, and if they ran low in resins they would use more per barrel. They probably have the strictest kind of chemical control in their plant from top to bottom. They are scrupulous about those things. Smaller brewers and the less strong financial brewers—although some of the small ones are still very good—are probably not so

(Testimony of Robert Oppenheim.)

fussy—"fussy" may not be the right word—not so particular about their handling. But that is all hearsay. I couldn't give you a positive statement, because I have never had anything to do with that end of the business.

Mr. Kerr: That is all. Thank you.

### Recross-Examination

By Mr. Dougherty:

Q. Just one or two other matters. Mr. Oppenheim, did you ever discuss with Mr. Smith your problems in selling hops to [253] brewers?

A. With Mr. Smith?

Q. Yes. A. Not that I know of.

Q. What effect did the grain restrictions in the fall of '47 have on the sale of hops?

A. I don't think the over-all picture was very bad. There was a rush to brew heavily. I think November of 1947 was an extraordinarily big month for brewing, because every brewer in the United States pushed their brewing so as to have more beer in the cellars in case the grain restrictions went into effect. I don't believe, though, that seriously hurt the sale of the beer, because the beer sales went up and up and up.

Q. It was felt at that time that it might affect—

A. Yes, definitely, they were worried about their production of beer.

Q. Is there some sort of ratio between the use of grain and the use of hops?

A. I wouldn't think so, no, because, in the first place, barley or malt is not the only ingredient that

(Testimony of Robert Oppenheim.)

goes into the beer. That is, there are substitutes. There are corn products. When there was a scarcity of grain, they imported tremendous quantities of Manioc flour from Brazil, which was used as a substitute. And they used molasses and they used sugar and whatever they could lay their hands on. That is why some of the beer was not [254] so good during those restricted periods.

Q. Has there been any change in the tariffs on hops?

A. Yes, the tariff on hops was reduced from 24 cents a pound to 12 cents a pound sometime—during the year 1948, I think it was.

Q. Was that in the spring of '48?

A. That is my guess. I don't know positively.

Q. So that, as I understand it, the imported hops pay a lower tariff—

A. Yes. Naturally, anything that pays a tariff is imported.

Mr. Dougherty: Thank you. That is all.

(Witness excused.)

Mr. Hill: If the Court please, we request leave of the Court to amend our answer in the minor particulars in which the amendment was made in the Geschwill case.

Mr. Kester: I don't know exactly what that will be, but I don't imagine there will be any objection.

The Court: It may be done.

Mr. Kerr: Defendant rests, your Honor.

Mr. Kester: If the Court please, I am advised

that a witness just came into the courtroom that I have not had a chance to talk to.

The Court: Have you no other witness? [255]

KILIAN W. SMITH

the Plaintiff herein, was thereupon recalled as a witness in his own behalf, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Dougherty:

Q. Mr. Smith, there has been some reference here to selective picking. Would you tell us as a practical matter how your yard in 1947 was picked?

A. Well, it was picked principally by the pickers. They were after the biggest hops they could get.

The Court: That has all been covered over and over.

Q. (By Mr. Dougherty): With reference to the matter of the check which stated that it was the balance due for fuggles, did you accept that check as the balance due on that contract?

A. I took it because it was all Mr. Byers could do under the circumstances.

Q. And you didn't cash it?

A. I wasn't in agreement with the way they had treated me.

Q. In connection with taking in your fuggles, when Mr. Byers told you that he could only look at the fuggles if you agreed to deduct the advances, what did you tell him at that time?



(Testimony of Kilian W. Smith.)

A. I told him I thought it wasn't a very good deal. He said there was nothing he could do about it.

Mr. Dougherty: You may inquire. [256]

### Cross-Examination

By Mr. Kerr:

Q. Is that the language that Mr. Byers used at the time, that he could look at the fuggles only if you agreed to the deduction of the advances on the clusters, or did he use some other terms?

A. He says he couldn't take them in; he couldn't weigh them in.

Mr. Kerr: That is all. Thank you.

(Witness excused.) [257]

### D. E. BULLIS

was thereupon produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Kester:

Q. Your name is D. E. Bullis?

A. Yes, sir.

Q. Where do you live, Mr. Bullis?

A. Corvallis.

Q. What is your occupation?

A. Chemist in the Experiment Station.

Q. You are a chemist in the Experiment Station at the Oregon State College?

A. That is right.

(Testimony of D. E. Bullis.)

Q. What has been your training in chemistry?

A. Bachelor's degree in Chemical Engineering and Master's degree in Agricultural Chemistry.

Q. Where did you get your degree?

A. Oregon State College.

Q. About when did you get your training?

A. The Bachelor's degree was obtained in 1917 and Master's degree in 1929.

Q. Have you specialized in agricultural chemistry all that time?      A. I have.

Q. How long have you been associated with the Oregon State [258] College?      A. Since 1917.

Q. What is your particular field of activity there?      A. Largely food products.

Q. What type of work does that include?

A. That includes fruit, frozen foods and vegetables, and it has included considerable work on hops, work on peppermint, and products of that nature.

Q. What type of work do you do in respect to hops?

A. Our department has been concerned with work on methods of analysis, largely, and development of new methods of analysis. In addition to that, we have done some service work on analyses of samples for resin content.

Q. How long have you been working on methods of analyses of hops?

A. I should say since about 1934 or '35 is when it started.

(Testimony of D. E. Bullis.)

Q. Since then you have had a continuous program in an effort to develop methods in analyzing hops?

A. Up until the early years of the war. Since that time the work has been more or less discontinued; that is, temporarily at least.

Q. For whom do you make such analyses?

A. We have made analyses of commercial samples for various dealers and various growers in the State of Oregon. In connection with some of our research work we have analyzed commercial [259] samples from the State of California and from Washington.

Q. In your work has it been part of your duties to be familiar with the literature in the field of chemical analyses of hops?      A. It has.

Q. Were you instrumental in setting up the laboratory in Salem for the Pacific Hop Growers a number of years ago?      A. I was.

Q. You also helped set up the laboratory and put it in operation?      A. That is right.

Q. That was a laboratory that made this type of analysis for hop growers, was it not; growers and dealers, as a matter of fact?

A. I believe so, or at least those associated with that particular organization.

Q. On request do you make chemical analyses of hop samples sent to you?

A. We have in a few instances. Recently we are getting out of that phase of the service.

(Testimony of D. E. Bullis.)

Q. You are not doing that so much any more?

A. That is right.

Q. Over the years, though, it has been a recognized field of activity, making chemical analyses of hop samples?

A. At the time the service for analysis of seeds and leaves and stems was set up by the State College we also gave service [260] on chemical analyses, largely because there were no other laboratories available in the area where that could be obtained; and, secondly, because the information that we derived from that work was useful to us in our research program.

Q. Since that time other laboratories have developed which are doing similar work?

A. Some laboratories are, I think, as far as the leaf, seed and stem analysis is concerned. Of course, The State Departments of Agriculture now take care of that.

Q. From your experience in the analysis of hops you recognize, and of course it is common knowledge, that the soft resins of hops found in the lupulin are what go to make the flavor in the beer? That is common knowledge, isn't it?

Mr. Kerr: If the Court please, may the record show that all of the testimony relative to the resin contents or brewing qualities or chemical qualities of hops is going in over our objection on the ground that it is irrelevant. I believe Counsel made some reference yesterday or the day before to some

(Testimony of D. E. Bullis.)

decision of the United States District Court for this District on that subject. We are prepared to argue that point if the Court so desires. It is our view that that case is wholly and entirely not in point.

The Court: I am admitting it without regard to that case, which I have not examined, but admitting it subject to the objection which you just stated. Answer the question. Do you [261] have the question in mind? A. No.

Mr. Kester: Will you read it.

(Last question read.)

A. There are other constituents besides the soft resins.

Q. Would you explain that. What are the constituent elements that go to make up—

A. The hop oils have a lot to do with aroma and flavor. The soft resins, I believe, are considered constituents, the constituent which imparts the bitterness to beer.

Q. So that the volatile oils and soft resins are the desirable parts of the hop from the standpoint of making beer; is that right? A. I think so.

Q. And are those both found in the lupulin of the hop? A. Not entirely.

Q. Where?

A. You will find the resins and some oil also in the petals of the cone. It doesn't all reside in the lupulin itself.

Q. But the bulk of it is in the lupulin?

A. I believe that is correct.



(Testimony of D. E. Bullis.)

Q. Now, are your methods of analysis designed for the purpose of determining the amount or percentage of soft resins in the hops? A. Yes.

Q. Is that done by recognized chemical procedures? A. It is.

Q. Are there various different methods for arriving at that? A. There are.

Q. Do they, generally speaking, give somewhat equivalent results? A. Reasonably so.

Q. Now, with respect to the 1947 crop of Oregon cluster hops, did you have occasion to make a number of analyses of various commercial lots?

A. I did.

Q. I will ask the Bailiff to hand you three exhibits, Nos. 25, 36 and 37, so that you may have those before you. Referring to all of them generally, are those written reports signed by you giving the results of the chemical analyses of various lots of hops? A. Yes.

Q. Now, your report of September 20 there, that is one that was requested by the office of Mr. Paulus; is that right? A. I believe so.

Q. Will you look down the list—I think there are some twelve different commercial lots referred to there—will you look down the list until you find Sample No. 64, and then will you state for us, refreshing your recollection on it from that report, what the result was of your analysis of that sample of the Smith cluster hops. [263]

A. This is Sample 64 that you refer to?

(Testimony of D. E. Bullis.)

Q. Yes. A. You want that data read?

Q. Is that the one that has the name "Smith" written after it there? A. It does here.

Q. Will you give us those results, please.

A. The Alpha resin was 4.81 per cent; Beta resin, 8.75 per cent; preservative value, 67.3.

Q. Now, there is a reference there to Alpha resins and Beta resin. What are the Alpha and Beta resins?

A. They are two fractions of soft resins. Actually, the Alpha fraction is a bitter acid and it is very commonly termed Alpha resin. In our chemical analyses we are able to separate the two soft resin constituents and from them we are able by a certain chemical reaction to further remove the Alpha fraction. From the difference of the two, then, we are able to obtain what we term the Beta fraction, which is composed of a Beta bitter acid and several different resin constituents. It is not one compound. The Alpha resin is a chemical identity of a single compound.

Q. Then is it correct to say that the Alpha resin and the Beta resin together make up the soft resins?

A. They constitute the soft resins of the hop.

Q. Is there also a hard resin in the hop? [264]

A. Yes.

Q. That is called the Gamma resin?

A. Gamma or hard resin.

Q. Yes. Is that of any commercial value in the making of beer? A. No, it is considered not.

(Testimony of D. E. Bullis.)

Q. So you don't make any analysis to determine that?

A. We have on occasion. In these particular analyses, why, we didn't.

Q. How did you arrive at the preservative value figure which is there?

A. The preservative value is one index of the quality of the hop from a chemical standpoint, and it is arrived at by taking the percentage of Alpha resins and adding to that one-third of the percentage of Beta, and multiplying that sum by 10. It gives just a convenient index for indicating the quality from the standpoint of the antiseptic properties of those soft resins.

Q. I see. And the antiseptic property is one of the things that makes the beer keep; is that right?

A. That is correct.

Q. So that that is an index of some value in determining the quality of the hop; is that correct?

A. It is considered so.

Q. Now, will you look at the next report there, which is dated [265] January 15th, 1948. I will ask you if that is the report of an analysis made to Mr. Smith of a batch of his '47 hops?

A. Yes.

Q. Would you give us, likewise, the results of that examination.

A. The Alpha resin, 5.05 per cent; Beta resin, 9.55 per cent; preservative value, 82.3.

Q. Would you then look at the report of January 30, and, looking at the first part of that report,

(Testimony of D. E. Bullis.)

give us the results of that examination of a sample of his 1947 clusters.

A. Alpha resin, 4.36; Beta resin, 9.63; preservative value, 75.7.

Q. Now, referring down further in that report of January 30, and with these figures before you as to the results of three different samples from Mr. Smith's 1947 hops, how would you say that those figures compared with the average of the commercial lots of 1947 Oregon clusters which you had occasion to make such tests of?

A. Why, they run very close to that average value, I would say.

Q. The particular figure given in that letter of January 30, is there any comment there with respect to how that compares with the average?

A. I don't believe there is. I don't see it.

Q. Would you state into the record what the average of such analyses for Oregon was? [266]

A. For 1947 samples?

Q. For 1947, yes.

A. Of 29 commercial lots which we had occasion to test from the 1947 crop, the average values were: Alpha resins, 4.61; Beta resins, 8.75; perservative value, 75.3.

Q. How do those compare with the figures in that same report given for his hops?

A. They are somewhat lower.

Q. So that his hops analyzed somewhat higher than the average?

(Testimony of D. E. Bullis.)

A. That particular sample did.

Q. Yes. The other samples didn't give quite exactly the same results. Would you say that it would be fair to take an average of the three different tests that were made? Would that give a true picture?

A. I would have to know how the samples were drawn before I could answer that question.

Q. Well, assuming that the samples——

A. If the samples were properly drawn, representing the proper number of bales for sampling a lot, I should think an average of the three values would be all right to accept as representing the samples.

Q. I see. So that from the standpoint of chemical analyses, the average of those three different tests would be approximately the same as the average of the 1947 crop that you tested; is that correct?

A. I believe that would be calculated to about that, yes.

Q. And you had occasion to examine at least 29 commercial lots in 1947?

A. Yes. I had occasion to examine 29 lots up to the time this letter had been written.

Q. Do you know if you examined other lots?

A. I think we examined some after that.

Q. Do you know if they gave any results that would change materially these figures?

A. I believe they would not.



(Testimony of D. E. Bullis.)

Q. Now, one more thing, Mr. Bullis: You came here under subpoena today, did you not?

A. Yes.

Q. Let's see. You were asked previously to come yesterday?

A. That is right.

Q. Would you just tell us why you were unable to get here yesterday?

A. I called up Dean Schoenfeld, who is my employer, you might say, and asked him regarding coming up here to testify before this Court, and he said that the regulations were that none of the employees there were to accept such a summons unless accompanied by subpoena.

Q. And then when we got in touch with you last night you stated that you had to have a subpoena served on you in Corvallis before you could come?

A. That is right.

Q. So that the United States Marshal went down this morning and brought you back with him today?

A. That is correct.

Mr. Kester: Thank you.

### Cross-Examination

By Mr. Kerr:

Q. Mr. Bullis, how many lots did you say you made these tests on in 1947?

A. That is, commercial lots that are used for the average?

Q. Yes. A. Twenty-nine samples.

Q. Where did you get those samples?

A. Most of those samples were brought to the

(Testimony of D. E. Bullis.)

laboratory by Mr. Jack Sather, who was then a member of the Farm Crops Department, and they represented commercial samples in which he was interested and which he had collected.

Q. Were those samples that he was interested in because of mildew damage?

A. I don't know. I don't know what his interest in them was.

Q. Do you know whether or not the purpose of the investigation or the chemical analysis was to determine the effect of mildew damage upon the hops?      A. No, I don't know that. [269]

Q. Do you know whether or not these samples were of mildew-damaged hops?

A. No, I have no definite knowledge of that, either.

Q. Do you know the extent of the mildew damage in each of the 29 lots you referred to?      A. No.

Q. Now, referring to your letter of September 26th, I believe, which you testified from or concerning which you testified——

Mr. Kerr: And I might say to the Court that we have not seen anything except the one letter which he referred to, of September 26th.

Mr. Kester: They have all been marked and been in evidence here for several days, and he saw them at the time of the deposition weeks ago.

Mr. Kerr: Is that what he was referring to, the material that was in evidence?

Mr. Kester: Yes.

(Testimony of D. E. Bullis.)

Mr. Kerr: Very well.

Q. Now, referring to your letter of September 26th, you say Sample No. 64 is Kilian Smith's sample?

A. I had no knowledge that it was Kilian Smith's sample at the time I ran it.

Q. But the sample that is listed in that letter as Sample No. 64, that was a sample which was marked 64 when you got it; is that right? [270]

A. Yes, that is the only identification it had on it.

Q. Now, with reference to the Alpha resin, did you say that is the soft or the hard resin?

A. It is one of the soft resins.

Q. One of the soft resins. Lot or Sample No. 64 is one of how many samples covered by that report? 12; is that right?

A. This particular one, I think, there are 12 in, yes.

Q. Have you determined where, relatively, in numerical order Lot No. 64 stands on your determination of Alpha resin content?

A. In that particular series of samples?

Q. Yes. A. I have not.

Q. As a matter of fact, it stands at sixth, doesn't it, the sixth in Alpha resin content, in percentage basis, sixth out of twelve?

A. That is, you mean in decreasing order or increasing order of Alpha resin content the sixth on this list?

Q. In decreasing order, the percentage of Alpha

(Testimony of D. E. Bullis.)

resin content.

A. It would appear here to be the seventh one, I think. No, in increasing order it would be sixth.

Q. Now, with relation to the Beta resins content Sample No. 64 stands seventh, does it not? It is seventh out of the twelve?

A. Yes, it is the seventh.

Q. And with respect to preservative value, which I believe you testified is of material importance so far as the brewing quality [271] is concerned, it stands No. 9 in the 12, does it not? A. Yes.

Q. Do you know whether any of the hop samples which you examined in 1947 in this manner, or tested in this manner, was a sample of prime quality hops? A. I don't know.

Q. You are not an expert on grades of hops, are you? A. Certainly not.

Q. You specified the average Alpha resins, Beta resins and preservative value content of the 12 samples we have been discussing, or the average, I guess, of the 29 samples. Which was it you referred to? For instance, the 4.61 per cent as an average of Alpha resin content, was that the average of the 29 lots that you examined? A. That is right.

Q. All right. Now, what was the maximum of those 29?

A. If I may refer to some figures here, I think I can give you that. The maximum Alpha resin content of those 29 was 5.7.

Q. 5.7? A. Yes.

(Testimony of D. E. Bullis.)

Q. Now, let's see. In the report of September 26th you show at least one of 5.76.

A. Well, I just rounded these figures up here to the first decimal place. [272]

Q. I see. And the maximum of the Beta resin—

A. 10.6.

Q. 10.6. Then the maximum in each case is included among the 12 specified in your letter of September 26th; is that right?

A. It probably is.

Q. And in preservative value what was the maximum? A. 90.7.

Q. In 1947, I mean. Did you make a similar test of 1940 crop hops in Oregon?

A. Yes. We have some figures on 1940 crop hops.

Q. Do you recall how many samples in that case, as to the 1940 crop hops, you examined?

A. I believe it was 143 samples that were included in the average test.

Q. How many? A. 143 samples.

Q. 143? A. You said the 1940 crop?

Q. 1940 crop. A. Yes, 143 samples.

Q. What was the average of the Alpha resin content of those samples?

The Court: Haven't you got that in an exhibit?

The Witness: Sir? [273]

The Court: Have you got that on paper, those 1940 figures?

A. In these files I have here, these letters which were just handed me.



(Testimony of D. E. Bullis.)

Mr. Kester: They are in evidence.

The Court: I can read all those. You can argue it. You don't need to have him read it on the stand. This has gone far enough. Put the 1940 in as an exhibit if it is not in already.

Mr. Kester: It is in.

Mr. Kerr: May I see that exhibit, please, Mr. Bailiff?

The Court: If every witness got on and read all of his letters over again, we would never get through with the case.

Q. (By Mr. Kerr): According to Exhibit 39, the average preservative value of the 1940 hops, as you determined out of 143 samples, was 109.5 per cent, was it not? A. That is right.

Q. Can you account for the difference between the preservative value of the 1940 crop of hops which you sampled and those in 1947?

A. I can't account for it. I can express my opinion.

Q. Your opinion, please.

A. Because the 1947 crop of hops as a whole were of poorer quality, I think, than the 1940 crop.

Q. By reason of what, Mr. Bullis?

A. I am expressing my opinion only on the basis of the chemical [274] analyses from the standpoint of resin content.

Q. Do you know what caused that difference in chemical content? A. I do not.

(Testimony of D. E. Bullis.)

Q. You are not a brewmaster, are you, Mr. Bullis?      A. No.

Mr. Kerr: That is all. Thank you.

### Redirect Examination

By Mr. Kester:

Q. One more question, Mr. Bullis. Isn't it generally considered that the total of the soft resins should be around 11 per cent for satisfactory brewing quality?

A. I couldn't answer that question. I don't know what a brewmaster considers as a satisfactory soft resin content.

Q. Isn't that common knowledge in the chemical analysis of hops?

A. Not in chemical analyses, it isn't, as far as I have read.

Q. You know, of course, Miss Lela Cushing, do you not?      A. Yes.

Q. She was the chemist in charge of the Pacific Hop Growers laboratory in Salem?      A. Yes.

Q. You established that laboratory for her and taught her the methods and worked with her there, did you not?      A. That is correct. [275]

Q. Would it refresh your recollection any to recall the time that she testified in the case of Stenberg against Tautfest to the effect that——

Mr. Kerr: Just a moment.

The Court: Let's have the question and then you can object.

Q. (By Mr. Kester): Would it refresh your

(Testimony of D. E. Bullis.)

recollection to recall the occasion when she testified in the case of Stenberg vs. Tautfest at Salem that around 11 per cent was required for a satisfactory brewing analysis?      A. No——

Mr. Kerr: We object to the question upon the ground——

The Court: Sustained. You say you don't know?

A. That is right.

Mr. Kester: All right. That is all.

Mr. Kerr: That is all.

(Witness excused.)

Mr. Kester: The Plaintiff is ready to rest, if the Court please, with the reservation that if there are any amendments to be made later they can be worked out.

Mr. Kerr: If the Court please, we would like at this time for the record to show our objections to certain exhibits which have been tendered subject to possible later objection by Counsel during the course of the trial. [276]

The Court: You can state that at the recess.

Mr. Kerr: Yes, sir. [277]

[Title of District Court and Cause.]

#### Reporters' Certificate

We, Ira G. Holcomb and John S. Beckwith, Official Reporters of the above-entitled Court, do hereby certify that on January 27 and 28, 1949, we reported in shorthand certain proceedings occurring upon the trial of the above-entitled matter, that we there-

after caused our respective shorthand notes to be reduced to typewriting under our direction, and that the foregoing transcript, consisting of Pages numbered 1 to ....., both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by us in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 3rd day of November, A.D. 1949.

/s/ IRA G. HOLCOMB,

Official Reporter.

/s/ JOHN S. BECKWITH,

Official Reporter.

[Endorsed]: Filed December 28, 1949.

---

### CLERK'S CERTIFICATE

United States of America,

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of transcript on removal from Marion County, Oregon, Motion to dismiss, Order reserving decision on motion, Amended answer, Memorandum decision, Reply to counterclaim, Findings of fact and conclusions of law, Judgment, Notice of appeal, Supersedeas bond, Order extending time to file appeal, Statement of points, Designation, Order to send exhibits, Appellee's designation, Order extending time to file appeal, Transcript of docket entries, con-

stitute the record on appeal from a judgment of the said court in a cause therein numbered Civil 4083, in which Hugo V. Loewi, Inc., a corporation is defendant and Appellant, and Kilian W. Smith is plaintiff and Appellee; that the record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and the designation filed by the appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of proceedings of January 27 and 28, 1949, filed in this office in this cause, together with exhibits 1, 2, 3 to 32 inc., 33-A, 33-B, 33-C, 34, 36 to 45 inc., 45-A, 46 to 51 inc.

I further certify the filing fee of \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of December, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,

Chief Deputy.



[Endorsed]: No. 12441. United States Court of Appeals for the Ninth Circuit. Hugo V. Loewi, Inc., a corporation, Appellant, vs. Kilian W. Smith, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 28, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

---

In the United States Court of Appeals  
For the Ninth Circuit

No. 12441

HUGO V. LOEWI, INC., a corporation,  
Appellant,  
vs.  
KILIAN W. SMITH,  
Appellee.

STIPULATION WITH RESPECT TO  
PRINTING OF EXHIBITS

Whereas, there are in this cause a substantial number of documentary exhibits (including letters, telegrams, and other records) which would be very expensive to print or otherwise reproduce; and,

Whereas, the appeal involves factual issues, and

each party on brief and in argument will wish to refer to certain of said documentary exhibits;

It Is Hereby Stipulated, subject to the approval of the court, that an order may be entered on this appeal permitting all of said documentary exhibits to be considered by the court in their original form without the necessity of printing or otherwise reproducing the same.

The exhibits to which this stipulation refers have the following numbers:

(a) Plaintiff's exhibits: 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33-A, 33-B, 33-C, 34.

(b) Defendant's exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 45-A, 46, 47, 48, 49, 50, 51.

Dated this 21st day of December, 1949.

/s/ STUART W. HILL,

Of Attorneys for Appellant.

/s/ WILLIAM E. DOUGHERTY,

Of Attorneys for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

United States Circuit Judge.

[Endorsed]: Filed December 28, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF THE POINTS ON  
WHICH APPELLANT INTENDS TO  
RELY ON APPEAL.

The appellant hereby adopts the statement of points upon which it intends to rely on appeal, which was filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 12.)

Dated this 21st day of December, 1949.

KERR & HILL,  
/s/ ROBERT M. KERR,  
/s/ STUART W. HILL,  
Attorneys for Appellant.

State of Oregon,  
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Concise Statement of the Points on Which Appellant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,

Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 28, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE  
RECORD WHICH APPELLANT THINKS  
NECESSARY FOR CONSIDERATION OF  
POINTS TO BE RELIED UPON.

The appellant, Hugo V. Loewi, Inc., hereby designates for inclusion in the printed record on appeal the following portions of the record, proceedings, and evidence:

1. Transcript on removal from the Circuit Court of the State of Oregon for the County of Marion. (Transcript, Document No. 1) (The portion of this document other than the Complaint need not be printed unless it is required to be in the record by the practice of this court.)

2. Motion to dismiss, to strike, and for more definite statement. (Transcript, Document No. 2.)

3. Order reserving decision on motion. (Transcript, Document No. 3.)

4. Amended answer. (Transcript, Document No. 4.)

5. Reply to counterclaim. (Transcript, Document No. 6.)

6. Findings of fact and conclusions of law. (Transcript, Document No. 7.)

7. Memorandum of decision. (Transcript, Document No. 5.)

8. Judgment. (Transcript, Document No. 8.)
9. Notice of appeal. (Transcript, Document No. 9.)
10. Supersedeas bond. (Transcript, Document No. 10.)
11. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949. (Transcript, Document No. 11.)
12. Statement of points on which defendant intends to rely on appeal. (Transcript, Document No. 12.)
13. Designation of contents of record on appeal, filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 13.)
14. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case. (Transcript, Document No. ....)
15. Order to send original exhibits. (Transcript, Document No. 14.)
16. Order extending time to file record on appeal. (Transcript, Document No. 16.)
17. Transcript of docket entries. (Transcript, Document No. 17.)
18. Clerk's certificate of transcript. (Transcript, Document No. 18.)



19. The following exhibits:

(The following designation of exhibits is to be disregarded if an order is entered by the court pursuant to the stipulation filed contemporaneously herewith.)

(a) Plaintiff's exhibits having the following numbers: 13, 14, 16, 17, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33-A, 33-B, 33-C, 34.

(b) Defendant's exhibits having the following numbers: 1, 2, 3, 4, 5, 6, 7, 8, 9, 36, 37, 42, 43, 44, 45, 45-A, 46, 47, 48, 49, 50, 51.

20. This designation of the portions of the record which appellant thinks necessary for consideration of points to be relied upon.

21. Stipulation with respect to printing of exhibits.

22. Order which may be entered pursuant to such stipulation.

Dated this 21st day of December, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,

County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of the Portions of the

Record which Appellant Thinks Necessary for Consideration of Points to be Relied Upon, and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,

Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 28, 1949.

---

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD CONSIDERED MATERIAL ON THE APPEAL

The appellee, Kilian W. Smith, having been served with appellant's designation of certain portions of the record, hereby designates the following additional parts of the record which appellee thinks material to the consideration of the appeal:

1. Appellee's designation of additional contents of record on appeal. (Transcript, Document No. 15.)

2. Plaintiff's Exhibits 10, 11, 12, 15, 18 and 23; and Defendant's Exhibits 38, 39, 40 and 41. (The

printing of exhibits is subject, however, to such order as the Court may enter in connection with the stipulation, heretofore filed, relating to the consideration of the exhibits in their original form.)

3. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records now before this Court on appeal from the judgments of the United States District Court for the District of Oregon in the cases of

Hugo V. Loewi, Inc., Appellant, vs. Fred Geschwill, Appellee, No. 12440, and

John I. Haas, Inc., Appellant, vs. O. L. Wellman, Appellee, No. 12442,

which two civil actions were tried in the District Court jointly with this action. (The printing in this case of the records in those cases is subject, however, to such order as the Court may enter with respect to appellee's motion referred to in the next paragraph below.)

4. Appellee's motion for consolidation of the record in this case with the records on appeal in the two cases named in the preceding paragraph, which motion is filed contemporaneously herewith.

5. Such order as the Court may enter with respect to appellee's motion referred to in paragraph 4 above.

6. This designation of additional parts of the record considered material on appeal.

Dated this 30th day of December, 1949.

/s/ ROY F. SHIELDS,  
/s/ RANDALL B. KESTER,  
/s/ WILLIAM E. DOUGHERTY,  
MAGUIRE, SHIELDS,  
MORRISON & BAILEY,  
Attorneys for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed January 3, 1950.

---

[Title of Court of Appeals and Cause.]

MOTION FOR CONSOLIDATION  
OF RECORDS

Now comes the appellee, Kilian W. Smith, and moves the Court to consolidate, for the purposes of this appeal, the record in this case with the records now before the Court in the contemporaneously appealed cases of

Hugo V. Loewi, Inc., Appellant, vs. Fred Geschwell, Appellee, No. 12440, and

John I. Haas, Inc., Appellant, vs. O. L. Wellman, Appellee, No. 12422,

to the extent that (a) the evidence, exhibits and proceedings contained in the records on appeal in said other two cases may be considered as a part

of the record in this case, and (b) any part of the evidence, exhibits or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case.

In support of the foregoing motion the appellee respectfully shows the Court:

1. All three cases are civil actions which involve common questions of law and fact.

2. The three cases were tried jointly in the District Court. There is one combined record for all three cases to this extent: The parties consented and the District Court ordered that the evidence in any of the three actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together in so far as such evidence was pertinent, material and relevant.

3. Appellant's designations of record in the three cases undertook to divide such combined record into three distinct and separate parts. By appellee's cross-designations the part of the combined record below contained in each of the records on appeal has been included in the record on appeal in the other cases. It would, however, be very expensive, and we think unnecessary, to print again in this case the portions of the combined record which will be printed and will be before the Court in said other two cases.



4. Appellant's statement filed herein indicates that twenty-two of the fifty-four points upon which appellant intends to rely (being Points 1 through 22) relate to the District Court's findings of fact. In order to meet appellant's contentions on such factual issues in this case it will be necessary for appellee to refer in part to evidence which is material and relevant to this case, and which appears in the combined record, but which under appellant's designation would be printed or otherwise available for consideration only by reference to the record in another of said cases.

5. Appellant's statement filed herein indicates that eight of the points upon which appellant intends to rely (being Points 47 through 54) relate to asserted errors in admitting evidence during the trial in the above-mentioned case of *Hugo V. Loewi, Inc., Appellant vs. Fred Geschwill, Appellee*. In order to permit consideration of such issues, appellee deems it necessary to have the record in that case before the Court in this case.

6. The Federal Rules of Civil Procedure, whenever applicable, have been adopted as part of the Rules of this Court with respect to appeals in actions, such as these, of a civil nature. Rule 42 (a) of the Federal Rules of Civil Procedure provides:

“(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may

order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

It is submitted that the foregoing rule is applicable here, and that the granting of appellee’s motion together with the like motions filed in said other two cases would, within the intent and purpose of that rule, facilitate the Court’s consideration of each of the three cases, and also avoid unnecessary costs.

The foregoing statements of fact are based upon the records before the Court, and are also verified by the affidavit appended hereto.

Subject to the approval of the Court, the appellee submits the foregoing motion without oral argument, unless a hearing be requested by the appellant.

Respectfully submitted,

/s/ ROY F. SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM E. DOUGHERTY,  
MAGUIRE, SHIELDS,

MORRISON & BAILEY,

Attorneys for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

U. S. Circuit Judges.

## AFFIDAVIT

State of Oregon,  
County of Multnomah—ss.

I, William E. Dougherty, being first duly sworn, do depose and say that I am one of the attorneys of record for appellee in the within-entitled case, that I have knowledge of the facts, and that the statements made in support of the foregoing motion are true as I verily believe.

/s/ WILLIAM E. DOUGHERTY.

Subscribed and sworn to before me this 30th day of December, 1949.

[Seal]      /s/ MARION HUGGINS,  
Notary Public for Oregon.

My commission expires: March 13, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed January 4, 1950.

---

[Title of Court of Appeals and Cause.]

ANSWER TO MOTION FOR CONSOLIDATION  
OF RECORDS

Now comes the appellant, Hugo V. Loewi, Inc., a corporation, and files this Answer to the Motion for Consolidation of Records heretofore filed on behalf of the appellee. We consent on behalf of the

appellant that the evidence, exhibits and proceedings contained in the records on appeal in said other two cases may be considered as a part of the record in this case, so far as pertinent, and that any part of the evidence, exhibits, or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case, so far as pertinent.

In support of this Answer, we rely upon the portion of the Transcript of Proceedings in the case of Hugo V. Loewi, Inc., a Corporation, Appellant, v. Gred Geschwill, Appellee, a portion of which is set forth in the Answer to Motion for Consolidation of Records filed in that case contemporaneously herewith.

Respectfully submitted,

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,

County of Multnomah—ss.

I, Stuart W. Hill, being first duly sworn, depose and say that I am one of the attorneys of record for appellant in the within-entitled case, that I have knowledge of the facts, and that the statements

made in support of the foregoing Answer are true as I verily believe.

/s/ STUART W. HILL.

Subscribed and sworn to before me this 7th day of January, 1950.

[Seal]      /s/ GERALDINE RIST,  
Notary Public for Oregon.

My Commission Expires May 22, 1953.

State of Oregon,  
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Answer to Motion for Consolidation of Records and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated January 7, 1950.

STUART W. HILL,  
Of Attorneys for Appellant.

State of Oregon,  
County of Multnomah—ss.

I, Geraldine Rist, being first duly sworn, depose and say: On January 7, 1950, I mailed a copy of this Answer to Motion for Consolidation of Records to Maguire, Shields, Morrison & Bailey, Attorneys for the Appellee, by depositing the same in the United States mail, correctly addressed to their



office in the Pittock Block, Portland, Oregon, first class postage fully prepaid.

/s/ GERALDINE RIST.

Subscribed and sworn to before me this 7th day of January, 1950.

[Seal]      /s/ STUART W. HILL,  
Notary Public for Oregon.

My Commission Expires Feb. 27, 1953.

[Endorsed]: Filed January 9, 1950.



**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

HUGO V. LOEWI, INC., a Corporation,  
*Appellant,*

v.

KILIAN W. SMITH,  
*Appellee.*

---

**BRIEF OF APPELLANT**

---

Appeal from the United States District Court for the  
District of Oregon.

---

KERR & HILL,  
ROBERT M. KERR,  
STUART W. HILL,

Equitable Building,  
Portland, Oregon,  
*Attorneys for Appellant.*

FILED

JUL 1 1950

PAUL P. O'BRIEN,

CLERK



## SUBJECT INDEX

	Page
Jurisdiction .....	1
Statement of Case .....	3
Specification of Errors .....	13
Argument .....	21
Summary of Argument .....	21
I. The findings of fact with respect to the quality and condition of the hops tendered by the plaintiff to the defendant, are clearly erroneous and are unsupported by any substantial evidence .....	23
II. The defendant was not bound to take delivery of the plaintiff's hops and was justified in rejecting them .....	38
III. The court erred in concluding as a matter of law that the plaintiff substantially performed all of the terms and conditions of the agreement on his part to be performed, and that the defendant wrongfully refused to and did not perform its obligation under said contract .....	38
IV. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the facts of this case do not bring it within the operation of the provisions of the Uniform Sales Act which permit such an action .....	39



## SUBJECT INDEX (Cont.)

	Page
V. The court erred in concluding as a matter of law that the property in the plaintiff's cluster hops passed to the defendant, and that the defendant became obligated to pay the plaintiff the amount due under said contract less the amount of the advance	42
VI. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the contract itself precludes that measure of recovery.....	42
VII. The court erred in failing and refusing to grant the defendant's motion to dismiss on the ground stated in paragraph 1 thereof (Tr. 36, 39), and in failing and refusing to sustain the first defense in the defendant's answer (Tr. 40).....	43
VIII. The court erred in concluding as a matter of law that the measure of the plaintiff's recovery upon the facts here is, under Oregon law, the difference between the amount due under said contract and the amount of the advance .....	43
IX. The defendant is entitled to a credit of \$3,000, the amount of the cluster advance, on the judgment rendered on the second cause of action, in the event the judgment on the first cause of action is reversed .	44
Conclusion .....	45

## TABLE OF CASES

	Page
Netter v. Edmunson, 71 Or. 604, 143 Pac. 636 .....	25

## UNITED STATES CODE

Title 28, U.S.C.A., Section 41(1) .....	2
Title 28, U.S.C.A., Section 71 .....	2
Title 28, U.S.C.A., Section 72 .....	2
Title 28, U.S.C.A., Section 1291 .....	3
Title 28, U.S.C.A., Section 1332 .....	2

## OTHER STATUTES

### IN

## OREGON COMPILED LAWS ANNOTATED

1 O.C.L.A., Section 1-602 .....	2
1 O.C.L.A., Section 1-801 .....	2
5 O.C.L.A., Section 71-163 .....	39
5 O.C.L.A., Section 71-163(1) .....	40
5 O.C.L.A., Section 71-163(3) .....	40

## RULES OF FEDERAL PROCEDURE

Rule 52(a) .....	37
------------------	----

## TEXTBOOKS

Restatement of The Law of Contracts, Section 281 .....	35
Restatement of The Law of Contracts, Section 456 .....	35, 36
3 Williston on Contracts, Section 838 .....	35, 36
4 Williston on Contracts, Section 972 .....	32



**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

HUGO V. LOEWI, INC., a Corporation,  
*Appellant,*

v.

KILIAN W. SMITH,  
*Appellee.*

---

**BRIEF OF APPELLANT**

---

Appeal from the United States District Court for the  
District of Oregon.

---

**JURISDICTION**

This cause was commenced on March 16, 1948, in the Circuit Court of the State of Oregon for the County of Marion, to recover the purchase price of a quantity of hops, the amount for which judgment was demanded being \$15,351.38, exclusive of interest and costs (Tr. 2, 9, 28).

Within ten days thereafter, on March 26, 1948, a petition for removal of this cause was filed in said Cir-

cuit Court and an order of removal was entered by the judge of the Circuit Court (Tr. 34, 35), that being within the time allowed by Title 28, U.S.C.A., Section 72, inasmuch as that was at the time or before the defendant was required by Sections 1-602 and 1-801, Oregon Compiled Laws Annotated, to answer or plead to the complaint of the plaintiff. Thereafter, on April 23, 1948, the defendant entered in the District Court of the United States for the District of Oregon, a certified copy of the record in such suit commenced in such Circuit Court (Tr. 36).

This cause was removed to the District Court for the District of Oregon, by the defendant, a nonresident of Oregon, pursuant to Title 28, U.S.C.A., Section 71, this being a suit of a civil nature at law of which the District Courts of the United States were given jurisdiction (Tr. 2, 30, 34). The District Court for the District of Oregon had jurisdiction of this cause by reason of Title 28, U.S.C.A., Section 41(1), this being a suit of a civil nature at law where the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000, and is between citizens of different states, the defendant being a citizen of New York and the plaintiff of Oregon (Tr. 2, 30, 34). Upon the repeal of that section, the District Court had jurisdiction by reason of Title 28, U.S.C.A., Section 1332.

A final judgment was entered in this cause by the District Court, in favor of the plaintiff, on Sept. 30, 1949, for \$15,343.78, together with interest and costs (Tr. 56, 57).



This appeal was taken pursuant to Title 28, U.S. C.A., Section 1291. The notice of appeal from such judgment was filed on October 10, 1949 (Tr. 57).

## STATEMENT OF CASE

This is an appeal by the defendant from a judgment for the plaintiff in an action for the contract price of hops produced by the plaintiff in the year 1947 and contracted to be sold to the defendant. Two separate written contracts are involved, one relating to fuggle variety hops, and the other to cluster variety hops. The fuggle hops were accepted by the defendant, but the cluster hops were rejected by the defendant as not of the grade, quality and condition required by the contract.

The defendant moved for a dismissal of the cause of action relative to the cluster hops on the ground it fails to state a claim against the defendant upon which relief can be granted (Tr. 36, 39), but the court reserved decision thereon (Tr. 39). The same issue is raised by the defendant's amended answer (Tr. 40).

The defendant counterclaimed for \$3,000.00 which it advanced to the plaintiff pursuant to the contract on the cluster hops as a loan to cover harvesting and processing costs (Tr. 42).

This action was tried by the court without a jury. The court issued a Memorandum of Decision (Tr. 46), signed (with one change) Findings of Fact and Conclusions of Law prepared by the plaintiff's counsel (Tr. 47-56), and entered judgment (Tr. 56, 57) for the plain-

tiff for the sum of \$8,846.52 (the total contract price of the cluster hops less the advance of \$3,000.00 paid by the defendant to the plaintiff on those hops), and for the further sum of \$6,497.26 (the contract price of the fuggle hops less an advance payment of \$3,500.00 by the defendant to the plaintiff on those hops), and also for interest on both sums from October 31, 1947, and costs.

This is one of three cases involving contracts for the sale of hops which were tried before the same judge under stipulation and order that the testimony in each case shall apply to each other case insofar as material (Geschwill Tr. 504). The other cases are *Hugo V. Loewi, Inc., Appellant, v. Fred Geschwill, Appellee*, No. 12440 (hereinafter referred to as the "Geschwill case"), and *John I. Haas, Inc., Appellant, v. O. L. Wellman, Appellee*, No. 12442. Each of these cases is now on appeal to this Court and the records of all are consolidated for the purpose of each appeal (Tr. 357).

This court has now entered an order in the consolidated appeal of this case and the two cases just mentioned, by which counsel for the appellant and the appellee in the briefs filed by them in this case and in the Wellman case, may adopt by reference such portions of the briefs filed by them in the Geschwill case as are required in the briefs in the other two cases.

The issues in this case relate only to the cluster hops, to that part of the trial court's judgment which grants recovery under the cluster hops contract, and to the defendant's counterclaim for \$3,000.00 advances made on

the cluster hops. That portion of the judgment, amounting to \$6,497.26, which covers the plaintiff's claim on the fuggle hops, is not in question. The defendant's amended answer includes a continuing tender to the plaintiff of that sum (Tr. 44). The defendant thus acknowledges a liability to the plaintiff for \$3,497.26, which is the net amount of the plaintiff's claim on the fuggle hops less the \$3,000.00 advanced by the defendant to the plaintiff on the cluster hops.

The ultimate issues in this case are the same as in the Geschwill case: (1) whether or not the cluster hops tendered by the plaintiff and rejected by the defendant were of the grade, quality and condition required by the contract, and (2) if the hops did conform to the contract requirements, so that the defendant's rejection was a breach of contract, whether the plaintiff's measure of recovery is the contract price, or is limited by contract and statute to the difference between the contract price and the market value of the hops.

The cluster contract (Tr. 11) specifies that the hops shall be

“not affected by spraying or mold, but shall be of prime quality, in sound condition, of good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition.”

The measure of damages for any breach of the contract is fixed as follows (Tr. 15):

“\* \* \* upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value

thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the said party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages."

The contract was negotiated with the plaintiff by Lamont Fry, an employee of C. W. Paulus of Salem, Oregon, a commission broker or buyer of hops for the defendant and other hop dealers (Tr. 104-108, 195-198, 208-213) (Geschwill Tr. 322; Geschwill Exhibit 51, Tr. 290). The contract was executed in Oregon on August 19, 1947 (Tr. 109, 230; Exhibit 1, Tr. 88). Its general provisions are the same as those of the contract involved in the Geschwill case; it differs from the Geschwill contract only with respect to the identity and quantity of hops covered, the rate and amount of advances to be paid by the defendant, and the contract price provisions. It is a contract to sell "future goods" in that it provides for the sale and delivery in processed and baled state of hops which were growing on the vines when the contract was executed. Harvest of the hops began about August 25 (Tr. 102).

The defendant's rejection of the cluster hops was by reason of damage resulting from downy mildew which attacked the hops prior to harvest (Tr. 291, 292, 314; Exhibits 28, 29, Tr. 88, 91).

The plaintiff's estimates of his crop before harvest are significant. He told Mr. Fry prior to execution of the contract that he had "some" mildew (Tr. 147), and



he and Mr. Fry together walked through the cluster yard. At that time there was a very heavy set of hops on the vines (Tr. 139, 197), which the plaintiff estimated at 100 bales, including the hops affected by mildew (Tr. 139). He thought that possibly 50 per cent of the hops had been hit by the mildew (Tr. 103, 151). Mr. Fry noted substantial quantities of hops which were not affected by mildew and estimated that the production of mildew-free hops would amount to 50 bales (Tr. 138, 196, 197). At the plaintiff's suggestion 10,000 pounds (50 bales) were specified in the contract as the estimated contract quantity (Tr. 140; Exhibit 1, Tr. 88).

The plaintiff actually harvested, baled and tendered to the defendant 73 bales of cluster hops, or 23 bales in excess of the pre-harvest estimate of his mildew-free production (Tr. 103).

During the consideration of the possible size of the crop, the plaintiff and Mr. Fry also discussed the method to be followed in picking the hops so as to avoid harvesting the mildew-damaged hops. Mr. Fry testified and the plaintiff did not deny that it was understood that the plaintiff would not pick any mildewed hops (Tr. 198).

An advance payment or loan of \$3,000.00 was delivered by Mr. Fry to the plaintiff on August 27, 1947 (Exhibit 8, Tr. 88, 89), in response to the plaintiff's request for the production advance provided for by the contract (Tr. 110, 111). The \$3,000.00 was provided, instead of \$2,500.00 specified in the contract, in response to the plaintiff's representation that he needed the larger



amount because of increased pickers' wages (Tr. 111, 113, 215). This loan on the cluster hops was not repaid by the plaintiff, but was deducted by the defendant from the sum payable to the plaintiff for the fuggle hops at the time the defendant tendered payment for those hops (Exhibit 33-C, Tr. 88, 91).

The plaintiff admittedly made no earnest effort to avoid harvesting mildewed hops. He acknowledged that he harvested and baled all but 25 per cent of the cluster crop (Tr. 133) despite the fact that 50 per cent of the crop was mildewed (Tr. 103). He did not cut down any of the vines of mildewed hops ahead of the pickers in order to avoid the harvesting of those hops (Tr. 134, 135). He simply told his pickers "to let the worst ones hang," with the result that the pickers did pick mildewed hops, and "just skipped those that were real badly infected" (Tr. 134).

After the cluster hops had been baled and warehoused by the plaintiff, "type" samples were taken by Mr. Fry and forwarded to the defendant in New York (Tr. 232, 233). These samples are in evidence as Exhibits 54-A to 54-G (Tr. 88, 94). Upon receipt of the first of these samples, the defendant advised Mr. Paulus that the hops were blighted and of a quality which it could not deliver to its customers, and that it would not accept hops such as that sample (Exhibits 16, 17, Tr. 88, 90; Tr. 249, 315). The defendant further instructed Mr. Paulus either to demand the refund of all advances made to the plaintiff or to apply the advance which was made on the cluster hops against the amount due on

the fuggle hops which had been accepted (Exhibit 21, Tr. 88, 90).

Upon receipt of five additional type samples, the defendant informed Mr. Paulus that the samples were very poor quality, were badly blighted (meaning damaged by mildew), and could not be accepted as a prime delivery, and suggested that 10th bale samples be supplied for the defendant's final decision (Exhibits 22, 23, 24, Tr. 88, 90; Exhibit 27, Tr. 88, 91; Exhibit 46, Tr. 88, 93; Tr. 262, 318).

Mr. Paulus accordingly arranged with the plaintiff to obtain the 10th bale samples, and the plaintiff agreed in writing that the inspection and grading of the hops in the warehouse, the taking of such samples, the numbering of the bales, and the weighing of each bale, would not be considered an acceptance of the hops (Exhibit 5, Tr. 88, 89). A "trying" of each bale and a large sample of each 10th bale were then taken in the usual manner by Mr. Fry on October 3, 1947. These 10th bale samples are in evidence as Exhibits 52-A to 52-E, and 53-A to 53-G (Tr. 88, 93), and 57-A to 57-E (Tr. 88, 94, 275). Mr. Fry at that time informed the plaintiff that the hops were then neither accepted nor rejected but that they must await word from the defendant in the east (Tr. 122, 123, 127, 128).

Upon examination of the 10th bale samples, the defendant advised Mr. Paulus that these samples were blighted, off grade, and not a prime delivery and directed that the cluster hops be rejected and refund of advances obtained (Exhibits 28, 29, Tr. 88, 91). Mr.

Paulus immediately notified the plaintiff that the cluster hops did not meet the requirements of the contract as to grade, quality, character and condition and therefore could not be accepted, and requested payment of the \$3,000.00 which had been advanced to the plaintiff on those hops (Exhibit 3, Tr. 88).

The defendant on September 25, 1947 offered to buy a part of the plaintiff's fuggle hops which had been purchased but released by another dealer, to replace the unsatisfactory 73 bales of clusters. The defendant offered 91¢ per pound for these fuggle hops, as compared with the 84¢ per pound contract price of the cluster hops. This offer was kept open to October 1, 1947, but was rejected by the plaintiff (Tr. 231, 241, 242; Exhibit 45, Tr. 88, 93; Exhibit 34, Tr. 88, 91; Exhibit 44, Tr. 88, 93).

The plaintiff did not contend at the trial that the cluster hops tendered to the defendant were not affected by mildew. He asserted that "prime" quality as applied to hops, means "average of the crop for the crop year," or "merchantable," and that his 1947 crop clusters were of merchantable quality, and were better than average in lupulin content (Tr. 130). On cross-examination, however, he acknowledged that hops badly damaged by mildew are not of prime quality (Tr. 171, 172). He further acknowledged that in order to be of prime quality the hops should be fully matured and of good color (Tr. 165).

The plaintiff's witness, H. A. Cornoyer, a hop dealer and broker of more than 40 years' experience in the

Willamette Valley, testified that although the samples of the plaintiff's cluster hops were average for the year 1947 (Tr. 182), they all showed mildew which was readily apparent upon looking at the hops, were not of good color, and were not prime quality hops as that term is generally applied in the trade (Tr. 181, 185, 186). He further testified that the samples would be regarded as merchantable hops (Tr. 181) but that the mere fact that hops are merchantable does not necessarily mean that they are prime hops (Tr. 184).

Other witnesses for the plaintiff likewise testified that there was mildew in the plaintiff's cluster hop samples, and compared those samples with such samples of 1947 crop hops of other growers as they had seen (Tr. 189, 190, 334, 335).

The defendant's witnesses testified concerning the plaintiff's cluster hops in terms of the express provision of the cluster contract requiring delivery of hops not affected by mold, but of prime quality, in sound condition, of good color, fully matured, and in good order and condition.

Mr. Hoerner, Plant Bacteriologist of Oregon State College and the United States Department of Agriculture, specializing in a study of downy mildew in hops, testified that the sample of the plaintiff's cluster hops analyzed by him contained more than 83 per cent by weight of mildew-infected hops (Tr. 268). Such mildew is a type of mold which discolors the hops and may result in dead, brown immature burrs known as nubbins (Geschwill Tr. 366, 370).



Mr. Ray, a hop grower and dealer of more than 50 years' experience (Geschwill Tr. 391) examined all of the plaintiff's cluster samples, including those put in evidence by the plaintiff, and found them to contain obvious heavy mildew damage. He stated that none of the samples was of prime quality (Tr. 279, 280, 283, 284).

Mr. Eismann, a hop grower and dealer of 20 years' experience, also examined the Geschwill samples in court and testified that beyond any doubt none of them was of good color, each of them contained hops not fully matured, and that none of the samples was of prime quality (Tr. 285, 289).

Throughout the period from the selection by the plaintiff of the September 16th market price as the contract price for the cluster hops (Exhibit 6, Tr. 88, 89), to long after the rejection of the hops by the defendant, the market price for hops of the grade, quality and condition described in the contract remained at or above that contract price (Tr. 292) (Geschwill Tr. 361-363, 416, 419; Geschwill Exhibit 33, Tr. 285).

Settlement of the account covering the fuggle hops which were under contract to and accepted by the defendant, was offered to the plaintiff following rejection of the cluster hops. On October 25, 1947 a check for \$3,497.26 was delivered on behalf of Mr. Paulus to the plaintiff, bearing the notation "balance on contract delivery 59 bales fuggles" (Exhibit 9, Tr. 88, 89). This sum represented the full purchase price of the fuggle hops accepted by the defendant, less the \$3,500.00 paid



to the plaintiff as an advance under the fuggle contract, and less also the \$3,000.00 paid to the plaintiff as an advance under the cluster contract (Exhibit 33-C, Tr. 88, 91; Tr. 126). The plaintiff accepted but did not cash this check (Tr. 126, 127), and the same was returned to Mr. Paulus by the plaintiff's attorneys with their letter dated November 19, 1947 (Exhibit 10, Tr. 88, 89).

The plaintiff did not resell the 73 bales of cluster hops rejected by the defendant (Tr. 129).

## **SPECIFICATION OF ERRORS**

The District Court erred:

1. In finding that by the agreement of August 19, 1947, the plaintiff contracted to sell and the defendant contracted to buy the entire crop of cluster hops grown by the plaintiff in 1947 on his farm, and in basing the judgment thereon (Tr. 48). Such finding is clearly erroneous and is unsupported by substantial evidence, as the agreement itself provides that the defendant was required to accept and pay for only those hops which met the standards of quality and condition specified in the agreement (Tr. 12).

2. In finding that pursuant to said contract the plaintiff duly harvested, cured, and baled said cluster hops grown thereon in said year in a careful and husbandlike manner, and in basing the judgment thereon (Tr. 49). Such finding is clearly erroneous and is unsupported by substantial evidence, as the plaintiff acknowledged that he harvested and baled hops which he

knew to be damaged by mildew (Tr. 119, 120, 130, 134). Furthermore, this finding is wholly irrelevant and immaterial.

3. In finding that the defendant knew that said crop of cluster hops would in normal course show such mildew when picked and baled, and in basing the judgment thereon (Tr. 50). Such finding is clearly erroneous and is unsupported by substantial evidence. Furthermore, this finding is wholly irrelevant and immaterial as the plaintiff assumed the risk of mildew damage in his baled hops.

4. In finding that the plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state, and in basing the judgment thereon (Tr. 51). Such finding is clearly erroneous and is unsupported by substantial evidence, as the plaintiff acknowledged that he harvested and baled hops which he knew to be damaged by mildew (Tr. 119, 120, 130, 134)). Furthermore, this finding is wholly irrelevant and immaterial.

5. In finding that the plaintiff, with the assent of the defendant, delivered his baled cluster hops to the warehouse and set them aside for the defendant, and appropriated them to the contract, and in basing the judgment thereon (Tr. 51). Such finding is clearly erroneous and is unsupported by substantial evidence, as there is no evidence that the defendant expressed any assent whatever, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff. The only evidence on this point is that the

defendant, by rejecting the hops, expressed a decided unwillingness to take them as its own (Exhibit 3, Tr. 88).

6. In finding that the plaintiff duly performed all of the terms and conditions of the contract relating to such cluster hops, which he was required to perform, and in basing the judgment thereon (Tr. 51). Such finding is clearly erroneous and is unsupported by substantial evidence, if the contract is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

7. In finding that by the term "blighted" it was meant that the said cluster hops showed some mildew effect, and in basing the judgment thereon (Tr. 53), if that finding is construed to mean that these hops were rejected because of a slight degree of mildew infestation. Such finding is clearly erroneous and is unsupported by substantial evidence, as the undisputed evidence establishes that the defendant rejected the plaintiff's hops because of substantial damage by mildew (Tr. 291, 292, 301-307).

8. In finding that at the trial the defendant advanced the same specific objection to the said cluster hops, that is, that they were blighted, and in basing the judgment thereon (Tr. 53), if that finding is construed to mean that the defendant contended that the degree of mildew infestation was slight. Such finding is clearly erroneous and is unsupported by substantial evidence, as the evi-

dence is undisputed that the defendant contended at the trial that the plaintiff's hops were substantially damaged by mildew (Tr. 42, 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

9. In finding that upon the facts the claimed defect that the cluster hops were blighted was not material, and in basing the judgment thereon (Tr. 53). Such finding is clearly erroneous and is unsupported by substantial evidence, as it is undisputed that if the agreement between the parties is construed in the manner advocated by the defendant, the failure of the plaintiff's hops to meet the standards of grade, quality and condition specified in the agreement, was substantial (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

10. In basing the judgment upon a finding that said cluster hops, when tendered to the defendant, were merchantable (Tr. 53), as hops which are simply merchantable, that is, salable at some price, do not necessarily meet the standards of grade, quality and condition specified in the agreement, if it is construed in the manner advocated by the defendant. This finding therefore has no relation whatever to the contract obligation of the plaintiff.

11. In finding that the plaintiff delivered the identical crop of cluster hops which the defendant contracted to buy, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract covered future or unascertained goods deliverable only after processing (Tr. 10). Furthermore, the defendant agreed to accept



and pay for only hops meeting the standards of grade, quality and condition specified in the contract (Tr. 12).

12. In finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of cluster hops would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract plainly provides that the defendant was not obligated to accept and pay for any hops tendered to it which did not meet the standards of grade, quality and condition specified in such contract (Tr. 12). In the absence of evidence to the contrary, it must be conclusively presumed that the defendant did rely upon the warranty in the contract; there was no such evidence.

13. In finding that said cluster hops were of substantially the average quality of Oregon cluster hops accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, and does not form a proper basis for the judgment, as the contract cannot be construed to mean that average quality hops meet the standards of grade, quality and condition specified therein. Furthermore, such finding is wholly irrelevant and immaterial.

14. In finding that said cluster hops, upon tender and



delivery, substantially conformed to the quality provisions of the written agreement of August 19, 1947, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

15. In finding that the defendant was in default in the payment of the purchase price of said cluster hops and that \$8,846.52 was due and owing from the defendant on the first cause of action, as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's cluster hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

16. In deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties with respect to the cluster hops, on his part to be performed (Tr. 55). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

17. In deciding that the property in said cluster

hops passed to the defendant (Tr. 55), as this decision is contrary to law for three reasons: (1) The contract provides that title shall pass to the defendant only when the defendant tenders to the plaintiff the contract price of the quantity of hops accepted by the defendant. No such tender was ever made as the defendant rejected all of the plaintiff's hops. (2) As this was a sale for cash, title did not pass to the defendant as the defendant has never paid for the hops. (3) If this was not a sale for cash or cash on delivery, title did not pass as the hops did not meet the standards specified in the contract and the conditional assent of the defendant to the appropriation of the hops, implied from the delivery of the hops to the warehouse by agreement, was withdrawn by the rejection of such hops.

18. In deciding that the defendant became obligated to pay the plaintiff on or before October 31, 1947, on the first cause of action, the sum of \$8,846.52, being the contract price of \$11,846.52 less the advance payment of \$3,000.00 (Tr. 55), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

19. In deciding that the defendant wrongfully refused to and did not perform its obligation under said contract of August 19, 1947, covering said cluster hops (Tr. 55), as the undisputed evidence in this case establishes that, if this contract is construed in the manner

advocated by the defendant, the plaintiff's cluster hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

20. In deciding that the measure of the plaintiff's recovery on the first cause of action is, under the Oregon law, the difference between the amount claimed to be due under said cluster contract and the amount advanced to the plaintiff on that contract (Tr. 54, 55), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference between the contract price of said hops and the market value thereof at the time and place of delivery (Tr. 15). The plaintiff is bound by that provision.

21. In failing and refusing to apply the provision in said cluster contract of August 19, 1947 (Tr. 15), which fixed and determined the measure of damages as the difference between the contract price of the cluster hops and the market value thereof at the time and place of delivery (Tr. 54, 55), as the plaintiff is bound by that provision.

22. In deciding that the defendant should take nothing under its counterclaim against the first cause of action (Tr. 55), as the defendant is entitled to a judgment against the plaintiff on its counterclaim for \$3,000.00, the amount of the loan and advance to the plaintiff, in the event of a reversal of the judgment, the said sum not having been repaid to the defendant (Tr. 54). This sum should be deducted from the amount admittedly

owing by the defendant to the plaintiff on the second cause of action (Tr. 54).

23. In failing and refusing to grant the motion to dismiss the first cause of action, filed on behalf of the defendant (Tr. 36, 39), and in failing and refusing to sustain the first defense in the defendant's answer (Tr. 40), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference between the contract price of said hops and the market value thereof at the time and place of delivery (Tr. 15). The plaintiff is bound by that provision.

## **ARGUMENT**

### **Summary of Argument**

I. The findings of fact with respect to the quality and condition of the hops tendered by the plaintiff to the defendant, are clearly erroneous and are unsupported by any substantial evidence.

II. The defendant was not bound to take delivery of the plaintiff's hops and was justified in rejecting them.

III. The court erred in concluding as a matter of law that the plaintiff substantially performed all of the terms and conditions of the agreement on his part to be performed, and that the defendant wrongfully refused to and did not perform its obligation under said contract.

IV. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the



facts of this case do not bring it within the operation of the provisions of the Uniform Sales Act which permit such an action.

V. The court erred in concluding as a matter of law that the property in the plaintiff's cluster hops passed to the defendant, and that the defendant became obligated to pay the plaintiff the amount due under said contract less the amount of the advance.

VI. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the contract itself precludes that measure of recovery.

VII. The court erred in failing and refusing to grant the defendant's motion to dismiss on the ground stated in paragraph 1 thereof (Tr. 36, 39), and in failing and refusing to sustain the first defense in the defendant's answer (Tr. 40).

VIII. The court erred in concluding as a matter of law that the measure of the plaintiff's recovery upon the facts here is, under Oregon law, the difference between the amount due under said contract and the amount of the advance.

IX. The defendant is entitled to a credit of \$3,000, the amount of the cluster advance, on the judgment rendered on the second cause of action, in the event the judgment on the first cause of action is reversed.



## I

### **THE FINDINGS OF FACT WITH RESPECT TO THE QUALITY AND CONDITION OF THE HOPS TENDERED BY THE PLAINTIFF TO THE DEFENDANT, ARE CLEARLY ERRONEOUS AND ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE**

The defendant contends that no substantial evidence was introduced tending to establish that the hops tendered by the plaintiff to the defendant met the standards of quality and condition specified in the contract of sale.

The contract contains a provision with respect to grade, quality and condition (Tr. 11), identical to that in the Geschwill contract, in these words:

“Such hops shall not be the product of the first year’s planting, and not affected by spraying or mold, but shall be of prime quality, in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition.”

The portions of the Findings of Fact claimed to be clearly erroneous and not supported by any substantial evidence, will be considered separately.

#### **1. Paragraph 13 of Findings of Fact (Tr. 54):**

“Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality

provisions. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.”

This is practically identical to the corresponding finding in the Geschwill case. Consequently the three minor headings in that brief, page 21, are retained.

### **1. Paraphrase of Paragraph 13 of Findings of Fact (Tr. 54):**

- (a) Hops which are of average quality and condition conform to the warranty contained in the contract.

The testimony concerning the meaning which must be given to the warranty in this contract, was introduced in the Geschwill case. A summary appears in the brief filed in that case, pages 21 and 22, which is incorporated herein by reference.

By reason of the stipulation and order under which these cases were tried, the court ruled that no similar evidence would be received in the Smith case (Tr. 178, 179) (Geschwill Tr. 503, 504). This plaintiff did testify, however, that prime hops are average hops of the year in which grown (Tr. 130), but he acknowledged that hops badly damaged by mildew cannot be of prime quality (Tr. 171).

The defendant contends that the cases and practical considerations which are discussed under heading I, subdivision 1(a), in the Geschwill brief, pages 23 to 27, establish that the term “prime quality” does not mean “average quality for the year in which grown,” but that

it does mean that the hops shall not be the product of the first year's planting and they shall not be affected by spraying or mold, but shall be of good color, fully matured, cleanly picked, free from damage by vermin or disease, properly dried, cured and baled, and in good order and condition.

### **1. Paraphrase of Paragraph 13 of Findings of Fact (Tr. 54):**

- (b) The plaintiff's hops were of average quality and condition, and conformed to the warranty.

Witnesses called by the plaintiff testified that his hops were "average" or "a little better than the general average" in quality for the year 1947 (Tr. 182, 189). One of these was Mr. Cornoyer who had been a hop dealer for more than forty years (Tr. 177). He testified that the plaintiff's hops were not of prime quality because of the mildew (Tr. 181).

The plaintiff, when asked to compare his hops with the average grown in the Willamette Valley in 1947, simply said that they were better than average in lupulin content (Tr. 130).

An agricultural chemist, Mr. D. E. Bullis, was permitted to testify over the defendant's objection, concerning the results of chemical analyses of two samples of the plaintiff's cluster hops (Tr. 329-336). This testimony was clearly irrelevant by reason of the decision in *Netter v. Edmunson*, 71 Or. 604, 143 Pac. 636. Several exhibits were also introduced by which a comparison

can be made between the analyses of various samples of the 1947 hop crop, including the plaintiff's (Exhibits 25, 36, 37, Tr. 88, 91, 92, 331). This evidence has no probative value whatever because Mr. Bullis acknowledged that he did not know the extent of mildew damage in any of the 1947 samples analyzed by him. In other words, he did not know whether the other hops analyzed were of prime quality or were seriously damaged by mildew (Tr. 337).

In any event, Mr. Bullis admitted that, so far as preservative value is concerned, the maximum found in the 1947 samples was far below the average of 1940 samples analyzed by him. He explained this difference by stating that he thought the 1947 crop of hops as a whole was of poorer quality than the crop in 1940 (Tr. 340, 341).

All of this testimony was directed to the question whether the plaintiff's hops were of average quality for the year in which grown, in the Willamette Valley. None of it had any bearing on the real issue whether the plaintiff's hops were of "prime quality" as that term is defined in the warranty.

The testimony introduced by the defendant, on the other hand, establishes that this plaintiff's hops were heavily damaged by mildew, and that they were therefore not of prime quality, and were not of "good color," or "fully matured," as expressly required by the contract (Tr. 8, 277-280, 286-288, 301-307).

The analysis made by Mr. G. R. Hoerner, bacteriologist of the Oregon State College and U. S. Department

of Agriculture, specializing in a study of downey mildew in hops, is of great significance. The hop sample furnished to Mr. Hoerner was separated by him for this test in the same manner as that used by the Federal-State Inspection Service in making the determination of leaf and stem content which is accepted by both growers and buyers throughout the hop industry in this area as a factor in the determination of prices (Tr. 267, 268). Mr. Hoerner's test produced the following result: 83.58% by weight of this sample of the plaintiff's hops showed infected cones (Tr. 267-269). An examination of Exhibit 57E (Tr. 271) will demonstrate beyond any doubt that the infected portion of this sample was heavily and seriously damaged by mildew.

The sample thus analyzed by Mr. Hoerner was taken from one of the original 10th bale samples drawn from the bales when the hops were first sampled at the warehouse (Tr. 207, 208).

This test was strongly supported by the testimony of the witnesses produced by the defendant. Mr. Ray and Mr. Eismann examined all of the samples which were produced in court, 7 making up Exhibit 35, offered by the plaintiff, and 5 in Exhibit 52, offered by the defendant. Mr. Ray testified that the samples were not of prime quality because they were heavily damaged by mildew. He said there was no possibility of any hop expert grading them or any of them as prime quality. He added that they were not of good color because of mildew discoloration (Tr. 277-280). He described the mildew damage by saying that there was a very



general discoloration of the cones (Tr. 278). Mr. Eismann testified that the samples showed severe mildew damage and were not of prime quality. He said he did not see how there could be any doubt about this in the mind of any competent hop inspector or grader. He added that the hops were not of good color and that some of them were not fully matured (Tr. 285-288). Mr. Oppenheim, president of the defendant, testified that he regarded the plaintiff's hops as of poor quality and that he rejected them for that reason (Tr. 295, 301-308).

It will be evident in this case also that the plaintiff's witnesses directed their testimony to the question whether his hops were of average quality, and that the defendant's witnesses directed their testimony to the question whether such hops were of "prime quality" as that term is defined in the warranty itself.

It is equally evident that if the court construes this contract in the manner advocated by the defendant, it must be said that there is no substantial evidence tending to establish that the plaintiff's hops were of prime quality.

### **1. Paraphrase of Paragraph 13 of Findings of Fact (Tr. 54):**

- (c) The plaintiff's hops were substantially equal in quality to cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions.

In the first place, it is well settled that evidence of collateral transactions is not relevant when offered to establish the terms of a contract between the parties or that it was breached by one of them, for the reason that the rights of the parties can not be affected or concluded by such collateral transactions.

Citations supporting that proposition are found in the Geschwill brief, page 31.

In the second place, there is no evidence in support of the finding now being considered, except such as is so indefinite as to be wholly meaningless.

## **2. Paragraph 12 of Findings of Fact (Tr. 53):**

“Said \* \* \* hops \* \* \* tendered to the defendant  
\* \* \* were merchantable.”

It may be assumed that this finding of merchantability should be construed to mean that the plaintiff's hops were of average quality and condition, and that the defendant was therefore bound to take them, as there is an express finding to that effect in Paragraph 13 (Tr. 54). If so, it adds nothing to the latter.

If this finding of merchantability is construed to mean something else, there is only one clue in the findings to its proper construction.

All we know is that the court must have intended to find that the hops were not of “prime quality,” if that expression is given the meaning advocated by the defendant.

That conclusion is supported by these facts which can be verified by referring to the Findings of Fact and Conclusions of Law on file in this cause:

Counsel for the plaintiff proposed this finding with respect to quality and condition:

“Said 1947 crop hops produced by the plaintiff on said premises and tendered to the defendant under said contract were merchantable, were not affected by mold, were in sound condition and in good order, and were substantially fully matured, of good color, and of prime quality.”

The court struck out the remainder of that sentence after the word “merchantable.”

This finding is subject to such broad and varied interpretations that it has no materiality in this litigation. Furthermore, the word “merchantable” is not used in the warranty appearing in the contract nor is there any evidence ascribing to it any meaning by custom or usage, or otherwise.

The testimony shows that on some occasions when hops failed to meet the quality requirements of contracts, the buyers accepted them at reduced prices. In fact, the testimony indicates that in 1947 a considerable portion of the mildew-affected crop was sold at reduced prices. When hops failed to meet the quality provisions of contracts, it was simply a matter of negotiation of new “spot” sales at prices lower than provided in the contracts and based upon the lower quality of the hops (Geschwill Tr. 337, 338, 439, 445, 446). Consequently, when it is said that a particular lot of hops is “merchant-

able," that means simply that the hops are salable at some price, either the market price of prime quality hops, or some other price possibly substantially less than that figure.

The cases considered in the Geschwill brief, pages 33 and 34, establish that the finding of merchantability is wholly immaterial as it does not determine any issue in this case.

### **3. Paragraph 12 of Findings of Fact (Tr. 53):**

"By the term 'blighted' it was meant that the hops showed some mildew effect as stated above."

If, by the use of the word "some," counsel for the plaintiff who drafted these findings, intended to convey the impression that the defendant rejected these hops on the ground that they were infected with mildew in a minor degree, this finding is without any evidence whatever in its support. The testimony of several witnesses produced by the defendant establishes that the plaintiff's hops were heavily infected with mildew (Tr. 267-269, 277-280, 285-288). One of the witnesses who so testified was Mr. Oppenheim, president of the defendant. It was he who rejected these hops because of the serious nature of the blight (Tr. 295, 301-308), and the correspondence introduced in evidence so indicates (Exhibits 16, 17, 20, 21, 24, 27, 28, 29, 45, 48, Tr. 88-93).

### **4. Paragraph 12 of Findings of Fact (Tr. 53):**

"Upon the facts neither claimed defect (that the

plaintiff's hops were blighted and 'dirty picked') was material."

While the materiality of the objection advanced by the defendant is probably a mixed question of law and fact, it is clear that, insofar as the finding is one of fact, it is unsupported by any substantial evidence.

The oral testimony produced by the defendant shows that the plaintiff's hops were seriously or heavily damaged by mildew. The test conducted by Mr. Hoerner of Oregon State College, shows that more than 80%, by weight, of the sample of the plaintiff's hops tested by him, consisted of diseased burrs, petals and nubbins (Tr. 267-269).

### **5. Paragraph 13 of Findings of Fact (Tr. 54):**

"Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid."

There is no testimony whatever which remotely tends to support that finding. Both of these parties signed this contract containing the express warranty we have been considering, and it must be conclusively presumed that the defendant would not have entered into this contract if it had not expected and desired to receive prime quality hops, at least in the absence of substantial proof to the contrary. There was no such evidence.



## 6. Paragraph 5 of Findings of Fact (Tr. 50):

“Before entering into said cluster hop agreement defendant inspected said cluster hop crop and defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled.”

The defendant acknowledges that the first clause of this finding is correct. Mr. Fry, an employee of the defendant's Oregon broker, walked through the cluster yard with the plaintiff, before the contract was signed, and saw that a great many of the hops were damaged by mildew (Tr. 105, 196). It was then that Mr. Fry and the plaintiff estimated that the harvest of good cluster hops would be only 10,000 pounds (50 bales), in spite of the fact that there were 20,000 pounds (100 bales) on the vines (Tr. 102, 103, 106, 138-141, 197, 198). The quantity stated in the contract was 10,000 pounds (Tr. 10).

The defendant contends that the remainder of this finding, “the defendant knew that said hop crop \* \* \* would in normal course show such mildew when picked and baled,” is clearly erroneous and is unsupported by any substantial evidence.

In the first place, this was not a normal year. Hops in the Willamette Valley suffered the worst late attack of downey mildew with resultant damage to the cones themselves, that could be recalled (Tr. 256) (Geschwill Tr. 426, 427).

Secondly, the defendant had no knowledge which

hops would be harvested and which would be left on the vines (Tr. 197, 198).

Furthermore, Mr. Fry and the plaintiff discussed selective picking of the hops. Mr. Fry testified it was understood that the plaintiff would not pick any mildewed hops (Tr. 198). This was not denied by the plaintiff. In fact, it is confirmed by his own testimony given on direct examination. He testified that possibly 50 per cent of the hops in his yard had been hit by mildew at some stage in their growth or development (Tr. 103, 151). He added that the other 50 per cent would not be picked, by which he must have meant that the half which was affected by mildew would not be picked (Tr. 103). The plaintiff also testified that he told Mr. Fry when they were in the yard on the occasion mentioned, that it was very difficult to judge the probable production exactly, but that they could make a conservative estimate of 50 bales (Tr. 106). This was exactly one half of the total number of hops estimated to be growing on the vines (Tr. 138).

If this finding is sustained, however, it is wholly irrelevant and immaterial and cannot form a proper basis for the judgment, as the plaintiff unconditionally assumed the burden and risk of harvesting, curing and baling hops of the grade, quality, and condition described in the contract.

The contract itself declares that the defendant should have the right to inspect the baled hops when tendered by the plaintiff, and reject those not of the grade, quality and condition described in the contract (Tr. 12).

A clearer statement of assumption of risk can hardly be imagined. The circumstances also strongly support this conclusion. It was the plaintiff's obligation and not the defendant's to pick the hops and to do so in such manner as to eliminate those which were blighted. Furthermore, it was understood that this would be done, during a discussion of selective picking before the contract was signed (Tr. 198).

The authorities establish that under these circumstances, the plaintiff assumed the risk that his crop when harvested, cured and baled, might fail to meet the warranty. They further establish that, as a consequence, a claim by the plaintiff that it was impossible to harvest the good hops without also picking an excessive quantity of blighted ones, is irrelevant and immaterial, if the court should sustain the finding that the defendant knew that said hop crop "would in normal course show such mildew when picked and baled."

Restatement of the Law of Contracts, Sec. 281,  
Illustration 1.

Restatement of the Law of Contracts, Sec. 456,  
Illustration 2.

3 Williston on Contracts, Sec. 838.

The controlling fact is that there has been a failure of consideration due to the failure of the plaintiff's hops when harvested, cured and baled, to meet the warranty. This conclusion is supported by the argument under heading II of this brief in which the discussion in the Geschwill brief, pages 41 to 45, is incorporated by reference.

That such failure of consideration would be a defense in spite of a finding that it was impossible to harvest the good hops without also picking an excessive quantity of blighted ones, is amply demonstrated by the discussion in 3 Williston on Contracts, Section 838. It is there said:

“As the basis of the defendant’s excuse where the plaintiff has failed to perform, or is obviously going to fail to perform, is failure of consideration, the reason why the plaintiff fails to perform is immaterial. Even though his failure is excusable impossibility, the result is the same. The defendant has not got what he bargained for and need not perform.”

It is also declared in Section 838 that a claim of impossibility can be successfully advanced by the promisor in the event that the promisee knew of the impossibility at the time the contract was executed, only when the promisee assumed the risk of the failure of performance. This is also established by the Restatement of the Law of Contracts, Section 456, Illustration 2.

It must be concluded, therefore, that inasmuch as the plaintiff assumed the risk that his crop when harvested, cured and baled might fail to meet the warranty, it is entirely immaterial whether the defendant had knowledge when the contract was executed, that the plaintiff’s crop would in normal course show some mildew when picked and baled.

## **7. Paragraph 3 of Findings of Fact (Tr. 49):**

“Pursuant to said contract, plaintiff cultivated and completed the cultivation of said premises and duly

harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner.”

#### **8. Paragraph 8 of Findings of Fact (Tr. 51):**

“Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state \* \* \*.”

#### **9. Paragraph 8 of Findings of Fact (Tr. 51):**

“Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed.”

If what has been said in the argument under this heading I is correct and sound, the plaintiff did not do everything that he was bound to do under the contract, in that he failed to tender hops of prime quality. If he used the utmost care, he must still suffer the penalty of rejection as his hops did not comply with the warranty.

If the court construes the term “prime quality” to mean what the other expressions in the warranty specify, and to mean that the hops must be free of damage by mildew, it follows from what has been stated herein that the plaintiff has produced no evidence whatever that his hops met the standards of quality and condition expressed in the contract of sale.

The defendant respectfully contends that under these circumstances the findings discussed herein are clearly erroneous and should be set aside by reason of Rule 52 (a), Federal Rules of Civil Procedure, Title 28, U.S. C.A., following Section 723c, as it has been interpreted and applied in the cases relied upon in the Geschwill brief, page 40.



## II

### **THE DEFENDANT WAS NOT BOUND TO TAKE DELIVERY OF THE PLAINTIFF'S HOPS AND WAS JUSTIFIED IN REJECTING THEM**

Assuming that the conclusions stated in the argument under heading I are sound and that the hops tendered to the defendant did not meet the standards of grade, quality and condition specified in the contract of sale, the defendant was not bound to take delivery of such hops and was justified in rejecting them.

This is established by the decisions discussed in the Geschwill brief, pages 41 to 45. The argument therein is incorporated into this brief by reference.

## III

### **THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PLAINTIFF SUB- STANTIALLY PERFORMED ALL OF THE TERMS AND CONDITIONS OF THE AGREE- MENT ON HIS PART TO BE PERFORMED, AND THAT THE DEFENDANT WRONGFULLY RE- FUSED TO AND DID NOT PERFORM ITS OBLIGATION UNDER SAID CONTRACT**

This is established by the argument under headings I and II, which is incorporated herein by reference.

## IV

**THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE FACTS OF THIS CASE DO NOT BRING IT WITHIN THE OPERATION OF THE PROVISIONS OF THE UNIFORM SALES ACT WHICH PERMIT SUCH AN ACTION**

An action for the price can be maintained only when authorized by Section 63 of the Uniform Sales Act, Section 71-163, O.C.L.A. That section provides:

“(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

\* \* \* \* \*

“(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.”

The cases which support this proposition are cited in the Geschwill brief, pages 46 and 47.

### **Section 63(3) of the Uniform Sales Act**

Section 63(3) of the Act, Section 71-163(3), O.C.L.A., does not authorize a recovery of the price in this action for the reason that there is not the slightest evidence in this case that the plaintiff notified the defendant that the hops would thereafter be held by the plaintiff as bailee for the defendant.

Under these circumstances, the argument under this subdivision of heading IV of the Geschwill brief, pages 47 and 48, establishes that there can be no recovery of the price under Section 63(3) of the Act. That argument, therefore, is incorporated herein by reference.

### **Section 63(1) of the Uniform Sales Act**

Section 63(1) of the Act, Section 71-163(1), O.C.L.A., does not authorize a recovery of the price in this action for the reason that the property in the cluster hops referred to in the plaintiff's complaint has not passed to the defendant within the meaning of that section.

This is established by the authorities relied upon in the argument under this subdivision of heading IV of the Geschwill brief, pages 48-61, and it is, accordingly, incorporated herein by reference.

The three detailed contentions stated therein, pages 48 and 49, are repeated in this brief, as a comment appears to be necessary with respect to each.

The court is referred particularly to the explanation of these three contentions appearing in the Geschwill brief, page 49.

1. The parties agreed in their contract that title should pass upon the happening of a certain event: the giving of a notice by the defendant tendering the price of the hops accepted. This was never done as all were rejected.

The governing clause of the contract, paragraph "Second" (Tr. 12), is exactly the same as the comparable provision in the Geschwill contract. It is quoted in the Geschwill brief, pages 51 and 52.

2. This transaction was a sale for cash, and title has never passed to the defendant for the reason that the defendant has never paid for these hops.

Here again, the clause which governs the transaction in the Smith case (Tr. 12), is exactly the same as the comparable one in the Geschwill case, quoted in the Geschwill brief, page 52.

3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

One sentence in the Findings of Fact in the Geschwill case was challenged in that brief, pages 59 to 61.

A similar finding was made in the present case in paragraph 8 (Tr. 51), in these words:

"On or about September 15, 1947, after said cluster hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant,

delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said cluster hops and set same aside for defendant."

For the reasons stated in the argument in the Geschwill brief, pages 59 to 61, this finding is clearly erroneous. Accordingly, the argument and authorities relied upon are incorporated herein by reference.

## V

**THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PROPERTY IN THE PLAINTIFF'S CLUSTER HOPS PASSED TO THE DEFENDANT, AND THAT THE DEFENDANT BECAME OBLIGATED TO PAY THE AMOUNT DUE UNDER SAID CONTRACT LESS THE AMOUNT OF THE ADVANCE**

This is established by the argument under heading IV, which is incorporated herein by reference.

## VI

**THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE CONTRACT ITSELF PRECLUDES THAT MEASURE OF RECOVERY**

The provision concerning the measure of recovery in the contract we are considering in this case (Tr. 15),



is identical to that in the Geschwill case, quoted in the brief filed in that case, page 63. Accordingly, the argument under heading VI of that brief, and the authorities relied upon, pages 62 to 69, are incorporated herein by reference.

## VII

**THE COURT ERRED IN FAILING AND REFUSING TO GRANT THE DEFENDANT'S MOTION TO DISMISS ON THE GROUND STATED IN PARAGRAPH 1 THEREOF (TR. 36, 39), AND IN FAILING AND REFUSING TO SUSTAIN THE FIRST DEFENSE IN THE DEFENDANT'S ANSWER (TR. 40)**

This is established by the argument under heading VI, which is incorporated herein by reference.

## VIII

**THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE MEASURE OF THE PLAINTIFF'S RECOVERY UPON THE FACTS HERE IS, UNDER OREGON LAW, THE DIFFERENCE BETWEEN THE AMOUNT DUE UNDER SAID CONTRACT AND THE AMOUNT OF THE ADVANCE**

This is established by the argument under heading VI, which is incorporated herein by reference.

## IX

### **THE DEFENDANT IS ENTITLED TO A CREDIT OF \$3,000, THE AMOUNT OF THE CLUSTER ADVANCE, ON THE JUDGMENT RENDERED ON THE SECOND CAUSE OF ACTION, IN THE EVENT THE JUDGMENT ON THE FIRST CAUSE OF ACTION IS REVERSED**

The contract clearly contemplates that if, for any justifiable reason, the defendant does not accept and pay for any of the plaintiff's cluster hops, the plaintiff is obligated to repay the amount of the advance, \$3,000. The contract states (Tr. 13):

“ . . . the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and curing the same. . . . Said advances to be paid in the following manner: . . . \$2,500.00 on or about September 1, 1947.”

This cluster advance was made by the defendant to the extent of \$3,000.00, and has not been repaid (Tr. 54).

Under these circumstances the defendant is entitled, in the event of a reversal of the judgment on the first cause of action, to a credit of \$3,000.00 on the judgment rendered on the second cause of action. This is established by the cases cited in the Geschwill brief under heading IX, page 71, which are incorporated herein by reference.

## CONCLUSION

It is desired that every reference herein to a portion of the Geschwill brief, shall be regarded as an adoption of that portion by such reference.

The defendant respectfully prays that the judgment on the first cause of action be reversed and that a credit of \$3,000 be allowed the defendant on the judgment rendered on the second cause of action.

Respectfully submitted,

KERR & HILL,

ROBERT M. KERR,

STUART W. HILL,

Attorneys for Appellant.



United States  
**Court of Appeals**  
For the Ninth Circuit

---

HUGO V. LOEWI, INC., a corporation,  
*Appellant,*  
vs.

KILIAN W. SMITH,  
*Appellee.*

---

**Brief for Appellee**

---

Upon Appeal from the United States District Court  
for the District of Oregon.

---

ROY F. SHIELDS,  
RANDALL B. KESTER,  
WILLIAM E. DOUGHERTY,  
*Attorneys for Appellee.*

FILED

OCT 21 1950

PAUL P. O'NEILL





## SUBJECT INDEX

	Page
STATEMENT OF THE CASE	
The action is for the balance due on the purchase prices of two crops of hops bought under contract by appellant dealer from appellee grower.....	1
Consolidation of records in this and two companion cases .....	2
Appellant admits a balance due appellee on the cause of action on the fuggle hops, and the controversy here relates to the cause of action on the cluster hops.....	3
The cause of action here on the cluster hops is quite similar to the companion case of Hugo V. Loewi, Inc., v. Geschwill, No. 12440.....	6
Appellant's specifications of asserted error.....	7
The issues .....	8
The core of the controversy.....	9
Narrative statement of the facts.....	12
ARGUMENT	
Summary .....	24
I. Issue on quality of hops. The trial Court's finding that the hops substantially conformed to the contract is clearly supported by the evidence.....	25
Incorporation of material from appellee Geschwill's brief .....	25
Material particularly applicable to this case—	
A. There was no "warranty" that the hops would be free of mildew .....	25
B. Appellant relied on its own inspection, and cannot now claim such a warranty.....	27
C. Appellant cannot assert a claimed warranty which at the time the contract was made appellant led the grower to believe it would not assert.....	28
D. The buyer is estopped by its subsequent conduct from asserting any such claimed warranty.....	29
E. The trial Court's finding that the hops were merchantable is supported by the evidence.....	31
F. According to the custom of the hop trade these were prime quality 1947 Oregon cluster hops.....	32

## SUBJECT INDEX—Continued

	Page
II. Issue on form of action. Appellee, having made a valid tender of the hops, can maintain this action to recover the balance due on the contract.....	33
Incorporation of material from appellee Geschwill's brief .....	33
CONCLUSION .....	33
Appendix—Containing the trial Court's findings of fact and citations to the record supporting the findings on the 15 points as to which appellant asserts error.	

## TABLE OF CASES AND OTHER AUTHORITIES

### Decisions

(The asterisks indicate the hop cases.)

Bennett v. Scofield, 5 Cir., 170 F. 2d 887.....	7
*Gonter v. Klaber & Co., 67 Wash. 84, 120 Pac. 533.....	27, 29
*Hugo V. Loewi v. Long, 76 Wash. 480, 136 Pac. 673.....	29
Jesionowski v. Boston & Maine R. Co., 329 U.S. 452, 67 S. Ct. 401, 91 L. Ed. 416.....	7
*Lilienthal v. Cartwright, 9 Cir., 173 Fed. 580.....	29
*Lilienthal v. McCormick, 9 Cir., 117 Fed. 89.....	6
*Livesley v. Johnston, 45 Or. 30, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647.....	29, 30
Loose v. Flickinger, 121 Cal. App. 77, 8 P. 2d 517.....	27
Marshall v. Wilson, 175 Or. 506, 154 P. 2d 547.....	29
*Netter v. Edmunson, 71 Or. 604, 143 Pac. 636.....	21
Paul v. Salisian, 87 Cal. App. 721, 262 Pac. 779.....	27
Ritchie v. Drier, App. D.C., 165 F. 2d 238, cert. den. 334 U.S. 860, 68 S. Ct. 1518, 92 L. Ed. 1780.....	7
Schumacher v. Moffitt, 71 Or. 79, 142 Pac. 353.....	6
*Seidenberg v. Tautfest, 155 Or. 420, 64 P. 2d 534.....	33
Standard Cotton-Seed Oil Co. v. Excelsior Refining Co., 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386.....	26
*Wigan v. La Follett, 84 Or. 488, 165 Pac. 579.....	29
*Wolf v. Edmunson, 9 Cir., 240 Fed. 53.....	21

**TABLE OF CASES AND OTHER AUTHORITIES**  
**—Continued**

**Statutes and Rules**

	Page
Federal Rules of Civil Procedure	
Rule 52(a) .....	33
Oregon Compiled Laws Annotated	
§2-222 .....	29
§71-112 .....	27

**Other Authorities**

Restatement of Contracts	
§281 .....	30
§456 .....	30
Williston on Contracts, Rev. Ed.	
§688 .....	31
§838 .....	30
§972 .....	25, 27
Williston on Sales, Rev. Ed.	
§191c .....	31





United States  
**Court of Appeals**  
For the Ninth Circuit

---

HUGO V. LOEWI, INC., a corporation,  
*Appellant,*  
VS.  
KILIAN W. SMITH,  
*Appellee.*

---

**Brief for Appellee**

---

Upon Appeal from the United States District Court  
for the District of Oregon.

---

**STATEMENT OF THE CASE**

This is an action to recover the balances due on the purchase prices of two specific hop crops which defendant-appellant bought under contract from plaintiff-appellee.

The action was commenced in the State Court, and was removed to the Federal Court by appellant on the ground of diversity (S.R. 29-36). Both parties waived jury trial, and all issues were tried by the Court. The Court thereafter entered judgment for plaintiff-appellee, based upon findings of fact and conclusions of law (S.R. 47-57).

## Consolidation of Records

On trial it appeared that this action involved common questions of law and fact with two other cases then pending before the Court (and now also on appeal to this Court *sub nom.* Hugo V. Loewi, Inc., Appellant v. Geschwill, Appellee, No. 12440, and John I. Haas, Inc., Appellant, v. Wellman, Appellee, No. 12442). Accordingly the parties consented and the District Court ordered that the three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and should be considered in each of the others to the extent that such evidence was pertinent, material and relevant (G.R. 34-35, 504; S.R. 47-48, 179; W.R. 9, 409-410).<sup>1</sup>

This Court has entered orders in the three cases:

(a) Permitting the documentary exhibits to be considered in their original form without printing or otherwise reproducing them (G.R. 512-513; S.R. 346-347; W.R. 477-478).

(b) Consolidating, for the purposes of the appeal, the record in each case with the records in the other two cases, to the extent that the evidence, exhibits and proceedings contained in the records on appeal in all three cases may be

---

<sup>1</sup> In order to avoid unwieldy references, the following abbreviations are used to refer to the various parts of the consolidated record:

G. R.—“Geschwill Record,” meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Geschwill, No. 12440.

S. R.—“Smith Record,” meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Smith, No. 12441.

W. R.—“Wellman Record,” meaning that portion of the consolidated record printed in the case of John I. Haas, Inc. v. Wellman, No. 12442.

considered as a part of the record in each case, and without duplication of printing (G.R. 515-518; S.R. 354-357; W.R. 480-484).

(c) Permitting cross-references to be made among the briefs in the three cases. (Order endorsed on motion of appellant and consent thereto of appellee, and entered on or about June 2, 1950.)

### Cause of Action on Fuggle Hops

The complaint is in two causes of action: One for the price, less advance payment, of the cluster hops which appellant purported to reject (S.R. 2-7); and the other for the price, less advance payment, of the fuggle hops which appellant accepted and shipped out (S.R. 7-9).

Appellant admits (Br. 5) that the balance of the price is due on the fuggle hops. The only question is whether the cluster advance payment should be deducted from the fuggle price, and that depends upon the determination of the cluster cause of action.

The matter can best be illustrated as follows:

(a) *Computation per judgment and appellee's contention—*

Fuggle price .....	\$ 9,997.26	
Less: Fuggle advance..	(3,500.00)	
Balance due on fuggles.	<u>                    </u>	\$ 6,497.26
Cluster price .....	\$11,846.52	
Less: Cluster advance..	(3,000.00)	
Balance due on clusters	<u>                    </u>	8,846.52
Total principal due.....		<u>\$15,343.78</u>

(b) *Computation per appellant's contention—*

Fuggle price .....	\$ 9,997.26
Less: Fuggle advance..	(3,500.00)
Less: Cluster advance..	(3,000.00)
Balance due on fuggles.	<u>\$ 3,497.26</u>
Balance due on clusters	0.00
Total principal due.....	<u>\$ 3,497.26</u>

The uncontested findings of the trial Court ( Appendix, post, pp. i, iv-v, xxvi) include the following:

"3. On or about August 19, 1947 plaintiff as seller and defendant as buyer entered into the written cluster hop agreement received in evidence herein. \* \* \*

"4. As a part of the same transaction plaintiff and defendant entered into another contract whereby plaintiff contracted to sell and defendant contracted to buy certain fuggle hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon. Plaintiff duly performed all the terms and conditions on his part to be performed under said contract, and defendant received and accepted said fuggle hops, which consisted of 59 bales weighing 10,986 pounds net, at the price of 91 cents a pound. Against the total price of \$9,997.26 was applied the advance payment of \$3,500.00 made pursuant to said fuggle contract. The remaining balance was \$6,497.26. On October 25, 1947 defendant tendered plaintiff its check [S. Ex. 9] in the amount of \$3,497.26 bearing a notation that it was "for Balance on contract delivery 59 bales fuggles". In arriving at said amount defendant deducted the cluster contract advance hereinafter referred to. Plaintiff re-

fused to accept the check because of the stated condition [S. Ex. 10]. Defendant did not at any time pay or offer to pay plaintiff without such condition said balance of \$6,497.26 due under said fuggle contract, or said sum of \$3,497.26, or any other sum, and said balance remains due and unpaid. \* \* \*

“15. On plaintiff’s second cause of action, relating to the fuggle hops, there became due and owing from defendant to plaintiff on October 31, 1947 the sum of \$6,497.26, being the contract price of \$9,997.26 less the advance of \$3,500.00. No part of said balance has been paid.”

Toward the close of the trial of this case (S.R. 324) appellant obtained leave to file, and subsequently did file (W.R. 162), an amended answer (S.R. 40-45). In the amended answer appellant sought to obtain credit for the \$3,000 cluster advance both as a counterclaim against the cluster cause of action (S.R. 42-43; and see Applt’s Br. 20), and also as a credit against the amount due on the fuggle clause of action (S.R. 44). However, appellant on brief states (p. 5):

“The defendant thus acknowledges a liability to the plaintiff for \$3,497.26, which is the net amount of the plaintiff’s claim on the fuggle hops less [i.e., after deducting] the \$3,000.00 advanced by the defendant to the plaintiff on the cluster hops.”

As noted above, the judgment gives credit for the cluster advance by deducting it from the price of the cluster hops.



In the amended answer (S.R. 44) appellant alleged a tender, and a continuing tender, of "\$3,497.26 in full payment of the agreed and contract price for said [fuggle] hops" less both advances. As noted above, the tender of that sum in full payment was declined by appellee.<sup>2</sup>

All of appellant's specifications of asserted error relate to the cause of action, or the counterclaim, on the cluster contract.

### **Similarity of Cluster Cause of Action to Geschwill Case**

Insofar as the cause of action for the cluster hops is concerned, this case is quite similar to the companion case, with which it was tried and with which it is now on appeal to this Court, of Hugo V. Loewi, Appellant, vs. Geschwill, Appellee, No. 12440. For example, the buyer is the same in both cases; the contracts for the purchase of the specific crops of hops were made about the same time shortly before harvest in 1947; the buyer used the same printed form of contract; and appellant has stated (Br. 5) that the "ultimate issues" are the same. Appellant's brief in this case follows very closely its brief in the Geschwill case, and incorporates a large part of the prior brief by reference.

Pursuant to the Court's permission, and following appellant's example, we shall incorporate by

---

<sup>2</sup> In *Schumacher v. Moffitt*, 71 Or. 79, 142 Pac. 353, it was held that where the claim was disputed, and where plaintiff had cashed the defendant's check with the words "In full settlement of account to date" written on it, plaintiff was estopped from claiming that there had not been a full accord and satisfaction.

This Court held in *Lilienthal v. McCormick*, 117 Fed. 89, 96: "The law is well settled that there can be no valid tender of part of an entire debt. \* \* \* The proofs should be clear that a tender was fairly made, and that it was absolute and unconditional."

reference a large part of appellee's brief in the Geschwill case. As the trial Court said with reference to the same type of consolidation of proceedings before him (G.R. 504), this will leave for discussion in this case "just the particular core of the controversy about the particular crop."

### Specifications of Asserted Error

Appellant has sought to mend its hold by specifying as asserted error two grounds<sup>3</sup> not included in its designation of points on which it intended to rely, and it has abandoned 23 of the 54 points on which it stated it intended to rely.<sup>4</sup>

The first fifteen of the assertions of error are directed to the findings of fact of the District Court. For the purpose of showing in an orderly form that the findings are supported by the evidence,

---

<sup>3</sup> Specifications of asserted error Nos. 18 and 23 (Applt's Br. 19, 21) are not included in the designated points on which appellant stated it intended to rely (S.R. 62-77). Appellant did not bring up the full record (S.R. 78-79).

For example, appellant now for the first time seeks to assign error (Br. 3, 21) in the trial Court's not granting appellant's motion to dismiss. After the motion was filed the trial Court heard oral arguments and took the matter under advisement (S.R. 39, 83). Subsequently the trial Court filed his memorandum (G.R. 26): "The motions of defendants are provisionally denied. The legal questions raised by the motions are reserved to the pre-trial or trial." The record of the pre-trial proceeding (S.R. 84) is not before the Court.

*Jesionowski v. Boston & Maine R. Co.*, 329 U.S. 452, 458-459, 67 S. Ct. 401, 91 L. Ed. 416; *Ritchie v. Drier*, App. D.C., 165 F. 2d 238, 240, cert. den. 334 U.S. 860, 68 S. Ct. 1518, 92 L. Ed. 1780; *Bennett v. Scofield*, 5 Cir., 170 F. 2d 887, 889.

<sup>4</sup> The points (S.R. 62-77) on which appellant no longer relies, and which have not been made specifications of asserted error, are Nos. 4-7, 11, 12, 16, 29-54.

In addition, appellant has restricted the error claimed in three other points: Point No. 3 (S.R. 63) has been confined down to the matter in specification No. 3 (Br. 14); point No. 13 (S.R. 65), to the matter in specification No. 7 (Br. 15); and point No. 14 (S.R. 65), to the matter in specification No. 8 (Br. 15).

the findings are set out in their entirety in the Appendix to this brief with citations to the record on each contested point.

### The Issues

The specifications of asserted error can be grouped into two main divisions: (a) Those relating to the quality of the hops, appellant's knowledge thereof, appellee's performance and appellant's non-performance (being specifications Nos. 1 through 17, and 19, Br. 13-20). (b) Those relating to appellee's remedy and measure of recovery (being specifications Nos. 20 through 22, and non-designated specifications Nos. 18 and 23, Br. 19-21).

The "ultimate issues" proposed by appellant (Br. 5) are the same two as in the Geschwill case: One relates to the commercial quality of the hops; and the other to appellee's form of relief and measure of recovery.

Instead of paraphrasing here what was said in appellee Geschwill's brief on these matters the following portions of that brief are incorporated by reference in this brief:

The general background included in the narrative statement in appellee Geschwill's brief, and particularly pp. 5-9 and 13-15.

The material on the issue as to the quality of the hops, being pp. 19-45 of appellee Geschwill's brief.

The material on the issue as to the form of action, being pp. 46-75 of appellee Geschwill's brief.

## The Core of the Controversy

Appellant claims that it was entitled to reject the cluster hop crop because it showed mildew. The contract does not mention mildew,<sup>5</sup> but appellant claims that the general language as to "prime quality" in the contract constitutes a seller's "warranty" of freedom from mildew (Br. 28, 37).

With respect to this matter the trial Court found the following facts, which are not contested by appellant (Appendix, post, pp. v, ix-x, xii):

"5. In 1947 there was, and defendant knew that there was, widespread mildew in cluster hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop contract shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. Before entering into said cluster hop agreement defendant inspected said cluster hop crop and defendant knew that said hop crop then showed some mildew \* \* \*

"6. By said cluster hop agreement defendant contracted to make an advance payment to plaintiff of \$2,500.00 in order to enable plain-

---

<sup>5</sup> The contract does mention "mold" (S.R. 11), and counsel suggest (Br. 11) that "mildew is a type of mold".

This is based on Mr. Hoerner's testimony (G.R. 370) that *botanically* "downy mildew" could roughly be considered a type of mold or mildew. By this apparently he meant that mildew is a *fungus*, i.e., any of a group of plants comprising the molds, mildews, rusts, smuts, etc. (Webster's New International Dict., 2d Ed.)

Such mildew is not the "mold" referred to in the standard form of hop contract. Such mold is caused by the hop aphid, i.e., the hop louse. (G.R. 78-81.)

The trade terms used in the contract should not be given meanings different from those understood by the parties. (See appellee Geschwill's brief, pp. 21-30.)



tiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. \* \* \*

"7. Said cluster hop agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops, and that said crop when picked and baled would in normal course show such mildew. On or about August 26, 1947 defendant again inspected said hop crop during picking and before making the advance, and thereupon defendant elected to and did make the advance payment in the sum of \$3,000.00, a larger amount than called for by the contract. Any defect which said hop crop may have had by reason of blight or mildew was apparent to defendant at the time of said inspection. Defendant at that time instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance upon defendant's said instruction and advance payment. The mildew in said crop did not thereafter become more pronounced or prevalent. \* \* \*

"12. On or about October 16, 1947 defendant rejected and refused to pay for said cluster hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay



for said hop crop on the particular ground that said cluster hops were blighted and dirty picked, and on no other specific ground. \* \* \* Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same, or when defendant elected to make the advance payment, or when defendant instructed plaintiff to continue picking. The leaf and stem content was within the tolerance allowed by the terms of said agreement.”

Based largely upon those facts, which are uncontested, we contend:

(a) The parties clearly did not intend the contract to include any “warranty” of freedom from the mildew which was known to exist.

(b) Appellant cannot assert any such “warranty” because appellant did not rely thereon.

(c) Appellant cannot assert any such “warranty” because it induced appellee to believe, and to act on the belief, that it would not do so.

(d) Appellant is estopped from asserting any such “warranty” because of its conduct in making the harvesting advance and instructing appellee to continue picking.<sup>6</sup>

We also make two other contentions which are in addition to and not dependent upon the foregoing points, and as to which appellant contests some of the trial Court’s findings of fact:

---

<sup>6</sup> In other words, the governing principle of the case is as stated by the trial Court in his memorandum of decision (S.R. 46):

“\* \* \* In the Smith case the grower asked for directions, and was encouraged by the buyer to go further into buyer’s debt, after both parties knew the hops were mildewed.

“Under these circumstances, the buyer cannot now reject the hops on the ground that the hops do not comply with the contract. This would be abhorrent to equity.”

(e) Even though they showed some mildew, these hops were good merchantable hops, and of good brewing value. (Appendix, post, pp. xvi, xix-xx.)

(f) Even though they showed mildew like most of the 1947 cluster hops in the Willamette Valley, these hops were "prime quality" for that year. (Appendix, post, pp. xxiv-xxv.)

### Narrative Statement

All of the determinative facts appear in the Court's findings (S.R. 48-54, and Appendix, post, pp. i et seq.), and much of the general background is stated in appellee Geschwill's brief (pp. 5 et seq.). We shall not reiterate that material here, but rather fill in some of the background of this particular case which we believe to be inadequately or incorrectly described in appellant's statement of the case (Br. 6-13).

Before the middle of August, 1947, Mr. Smith had contracted to sell his first 100 bales of fuggle hops to Mr. Seavey, an independent hop dealer for whom Mr. Smith had previously worked as a hop inspector. At that time Mr. Smith had not sold either his cluster crop or the remainder of his fuggles over the 100 bales. (S.R. 95, 104, 243.)

About the middle of August Mr. Fry went out to Mr. Smith's hopyard to see about buying hops for appellant. Mr. Fry was a field man and hop inspector for Mr. Paulus, appellant's local represen-

tative.<sup>7</sup> Mr. Fry had previously been out inspecting the hopyards in the Willamette Valley with Mr. Oppenheim, appellant's president. It was from the surveys which he made about this time with Mr. Fry and Mr. Paulus<sup>8</sup> that Mr. Oppenheim gained his first-hand information of the wide-spread mildew in the Valley. (S.R. 118-119, 310-311; G.R. 291, 421-422, 426, 449, 453.)

When he went out to Mr. Smith's yard about the middle of August (S.R. 104, 209), Mr. Fry saw the fuggle hops being picked (S.R. 106, 209). The clus-

---

7 On trial appellant's counsel declined to stipulate (G.R. 289-290) that Mr. Paulus and his employees were acting as agents for appellant. Accordingly, the agency agreement between appellant and Mr. Paulus was introduced in evidence (S. Ex. 51).

The agreement requires Mr. Paulus to "create an organization," and provides that the "business of such organization shall be \* \* \* to negotiate on behalf of the Company [Hugo V. Loewi, Inc.] with growers and dealers for the purchase of future and spot hops grown or held for sale in the aforesaid territory [which includes Oregon], \* \* \* to take care of the making, recording and filing of all contracts on behalf of the Company, to supervise compliance by growers and others with the terms thereof, \* \* \* and to do such other and further things as the Company may deem appropriate to increase its business and prestige."

Upon the evidence there can be no question but that Mr. Paulus and Mr. Fry had authority from appellant for their dealings with Mr. Smith (e.g., S.R. 208-209, 228, 230, 243-245, 256-257, 310-312).

8 In appellant's brief (p. 6) counsel characterize Mr. Paulus as a "commission broker or buyer of hops for the defendant *and other hop dealers*". (Italics added.)

The agency agreement between Mr. Paulus and appellant, referred to in footnote 7, provides: "Paulus shall devote his entire time and attention to the aforesaid business and will not engage in any other business or in the same or a similar business, in any other place, except the production of hops."

Counsel indicate (Br. 6) that they base their above-quoted statement on the following testimony by Mr. Paulus (G.R. 322-323):

"Q. Do you buy hops for Hugo V. Loewi, Inc.?

A. Yes.

Q. Do you buy hops for other dealers?

A. I have, on occasions, yes."

The record does not show whether such "occasions" were prior to his agreement with appellant when Mr. Paulus was associated with another hop concern (G.R. 322), or whether such "occasions" were when appellant itself instructed Mr. Paulus to negotiate deals with other brokers (G. Ex. 41).

ter hops were then already formed on the vines, nearly ripe for harvest (S.R. 138, 142, 196), and Mr. Fry examined them closely. As Mr. Smith said (S.R. 105):

“\* \* \* He [Mr. Fry] told me he had been around the valley the last few days with his buyers and he said he knew there was mildew in the valley. I said, ‘You had better look at mine and see how bad they are and see if you really want to buy them,’ because in my experience in buying hops I would like to know what the crop looked like, especially at that time, because they were ready for harvesting.

“He was a bit reluctant to go back and look at the crop but he finally did go back, and we walked through the whole yard, and I asked him how it compared with these other yards that he had seen through the valley and he said that some yards were much worse and some were better—I mean in better condition as far as mildew infection was concerned.

“I told him I wanted to be sure and let his boss know what they were like before he contracted them, so at a later date he came and signed me up on a sales slip.”<sup>9</sup>

---

<sup>9</sup> Mr. Smith knew that his clusters had less mildew than most in the Valley (S.R. 101, 188-190), but he also thought that the dealers' low estimates of the production might be mistaken and the market might fall (S.R. 173). Further, harvesting costs were very high that year (S.R. 99-100, 113, 173). Accordingly, Mr. Smith did not want to harvest the clusters unless they were sold (S.R. 172-174, 176). It was for this reason that he insisted that the buyer be fully advised about the crop. As he testified on cross-examination (S.R. 172-173):

“I wanted him [Mr. Fry] to definitely understand what the hops were like, and I wanted him to definitely take that advice to his principals.

Q. I see. That was your purpose, to inform his employer, Mr. Paulus, as to what the condition of your hops was; is that right?

A. Yes. I wanted him to know so he could tell me whether he wanted to buy them or not to buy them. I wanted him to tell me that.”



At this time Mr. Fry had only an order for fuggles and Mr. Smith wanted to sell both the clusters and the remainder of the fuggles together (S.R. 104). As Mr. Fry said (S.R. 210-211), Mr. Smith

“\* \* \* had about 50 bales [of fuggles] left, so he wanted to sell his clusters, too, and I only had an order for fuggles, so he said, ‘Go back and see if you can get an order on clusters as well as fuggles.’ So I went back and talked to Mr. Paulus.”

Subsequently, after Mr. Oppenheim had made his inspection of the hopyards (S.R. 310), and his estimate of a short crop (G.R. 453), he gave orders to buy more hops, including some clusters. Mr. Oppenheim testified (S.R. 310):

“\* \* \* I gave him [Mr. Paulus] orders to buy a few hundred bales additional of hops, and we agreed to take clusters as well as fuggles.”

Having been authorized to do so (S.R. 208, 228, 244-245), Mr. Fry returned to see Mr. Smith and signed him up on a sales slip. Mr. Fry testified (S.R. 195):

“It was about August 17th that I had signed him on a sales slip and purchased his hops.”

The agreement was for the purchase of the surplus fuggle hops over the existing contract with Mr. Seavey, and the entire crop of cluster hops, at a floor price of 81 cents a pound or the market price at a date selected by the grower, with the usual premiums and discounts. Mr. Fry and Mr. Smith mutually agreed on an estimate of 10,000 pounds of clusters, and the picking advance speci-



fied in the contract was computed on that figure.<sup>10</sup> (S.R. 10-13, 19-23, 107-108; S. Exs. 1, 2.)

On August 19th Mr. Byers, from Mr. Paulus' office, went out to Mr. Smith's yard with two contracts for him to sign and paid him the \$3,500 advance payment on the fuggles. Contrary to its usual practice appellant had divided the transaction into two papers, one for the fuggles and the other for the clusters. The contracts were signed for appellant by Mr. Oppenheim in the Salem office. (S.R. 108-110, 220, 225-226, 230, 262; S. Ex. 1.)

Picking on the clusters began about August 25th and continued until about September 3rd (S.R. 110). Not only did Mr. Smith instruct his pickers to skip the badly mildewed vines and branches (S.R. 134), but they did so on their own volition because, as he said (S.R. 149):

“after all, they were looking for the big hops, nice clusters, because that is what makes weight in their baskets.”

While approximately 25 per cent of the hops were thereby left on the vines (S.R. 133), still the pickers naturally stripped off some “red” hops, just as

---

<sup>10</sup> Counsel state (Br. 7) that this was an estimate of Mr. Smith's “mildew-free production”.

Mr. Smith testified (S.R. 141) that such an idea “was not even mentioned.”

He said: “\* \* \* it [the estimate] was a basis for arriving at picking advances and to get somewhere close to letting him know how many we would have.” (S.R. 141.) “That was the figure that we mutually agreed upon. It was conservative.” (S.R. 138.) “It is usually customary to underestimate so you are sure you can at least deliver the full amount.” (S.R. 140.)

And see Appendix, post, pp. ii-iv, v-ix, ix-x.

they did some leaves and stems (Appendix, post, vii-ix).<sup>11</sup>

About the third day of picking Mr. Smith called Mr. Paulus' office for someone to come out and look at his yard again and to furnish the picking advance (S.R. 110-111). Mr. Fry came out around noon (S.R. 111) and told Mr. Smith that if the hops were about the same as they had been before he would make the advance (S.R. 214-215).

Mr. Fry then looked at the hops in the pickers' baskets and saw the "red" hops among them (S.R. 212-213). He and Mr. Smith discussed the picking and also the increase in pay to five cents a pound green weight<sup>12</sup> being generally offered to pickers.

---

11 Counsel assert (Br. 7): "\* \* \* plaintiff did not deny that it was understood that the plaintiff would not pick any mildewed hops."

Actually, Mr. Smith testified, concerning the time Mr. Fry inspected the hops before entering into the contract, as follows (S.R. 106): "He [Mr. Fry] said they needed hops, and he didn't see how they could buy hops that were not mildewed because most of them in the valley were mildewed."

Mr. Fry testified that during picking he told Mr. Smith he would look at the hops and if they were about the same as they had been before he would make the harvesting advance (S.R. 214). Mr. Fry did look at the hops in the pickers' baskets; he saw "red" hops among them; and he made an advance larger than specified in the contract (S.R. 214-215).

Counsel also erroneously assert (Br. 8): "The plaintiff admittedly made no earnest effort to avoid harvesting mildewed hops." Counsel so conclude on the assumption that the grower should have either picked burr-by-burr, or should have discarded every whole vine showing any mildew.

There is no evidence that burr-by-burr picking was either possible or contemplated (Appendix, post, ii-iv).

Since the mildew was uniform through the yard (S.R. 151, 196), it would have practically nullified the contract if, as counsel suggest, the grower had discarded every whole vine, and all the good hops on it, where any of the hops on it showed any mildew.

12 In the curing process the hops are dried down to about one-fourth of their green weight. "If you have, say, four pounds of green hops, you have one pound of dried hops; about one-to-four." (G.R. 191.)

Of course, the picking charge does not include the other costs of hauling, drying, baling, etc. (G.R. 192).

Mr. Fry said, as Mr. Smith testified (S.R. 174):

“He said, ‘Sure, we want you to pick them.’ He says, ‘If you need more money, call us and we will give you some more.’ He said if I had to go to six or seven cents a pound, why, feel free to ask for more money.”

Concerning this conversation Mr. Smith testified (S.R. 149):

“\* \* \* he stated at that time that he didn’t see how we could get away from getting some blight in.”

“He said to continue to pick them as clean as possible and do the best I could.”

Mr. Fry had brought out with him a signed check payable to Mr. Smith with the amount blank, and Mr. Fry had authority to fill in the amount in his discretion (S.R. 214-218). Having seen what had been picked and how they were picking Mr. Fry filled in the check for \$3,000 and gave it to Mr. Smith (S.R. 113, 213-215; S. Ex. 8). The contract called for an advance payment of \$2,500 (S.R. 13), but they mutually agreed on an advance in the larger amount.<sup>13</sup> Mr. Smith testified (S.R. 112-113):

“\* \* \* I told him I thought I would have enough money with that but he says, ‘If you need more, why, call us up.’ He said, ‘If you have to go higher and pay more than five cents a pound, you might need some more money.’”

<sup>13</sup> The advance seems to have been computed on the basis of 30 cents a pound cured weight on the estimate of 10,000 pounds (S.R. 113). At that time they discussed the size of the crop—that it looked as if it would turn out somewhat heavier than they first anticipated (S.R. 112). Mr. Smith testified (S.R. 114) that Mr. Fry said, “‘It is hard to determine exactly until you are through picking.’” As Mr. Oppenheim said in another connection (G.R. 453), “Nobody in the world can guess a hop crop until it is in the bales.”

Before Mr. Fry left the hopyard that day Mr. Smith asked him to stop up at the kiln to check on the hops there and to give the drier instructions (S.R. 114), and Mr. Fry did so (S.R. 214).

Mr. Smith had previously delivered the fuggle crop at the Oregon Electric warehouse in Salem, and about September 10th, after the cluster hops had been picked, cured and baled, he also delivered them at the same place, pursuant to the contract (S.R. 115, 251; Appendix, post, x). The official picking analyses were received, showing 7% leaf and stem content in the fuggle crop and 9% in the clusters (S. Exs. 14, 33A). Thereafter about September 17th Mr. Smith selected as the sales prices the then growers' market prices of 85 cents a pound on the clusters and 90 cents on the fuggles, subject to the usual sliding scale of premiums and discounts on the picking (S.R. 117-118; S. Exs. 4, 6; Appendix, post, iv, xii). Mr. Paulus promptly advised appellant of the price selections (S. Ex. 19).

The prices selected were then in fact the growers' market prices, because the market had adjusted to the mildew by allowing a premium of five cents a pound for the mildew-resistant fuggles (S.R. 240, 311). The ordinary market price for good, average-quality clusters was 85 cents a pound. As Mr. Ray expressed it (W.R. 255):

“Q. Do you know what the going market price on good, average-quality hops was in 1947, say, in September of that year?



A. Yes. I know that, \* \* \*. During September buyers were anxious to buy hops selling at 85 cents a pound, 85 cents a pound for prime-quality clusters, Oregon hops, and it was my opinion that 85 cents a pound was paid for cluster hops that were not fully prime in quality, and I would call those good hops."

There is substantial evidence that these were good merchantable cluster hops, of good brewing value, and of prime quality for 1947 according to the custom of the hop trade (Appendix, post, pp. xiv-xvi, xix-xx, xxiv-xxv). The three expert witnesses called by the seller testified as follows:<sup>14</sup>

Mr. Aman, the hop grower, found that these cluster hops were somewhat better than the average that year (S.R. 189-190).

Mr. Cornoyer, the independent hop dealer with years of experience, found that these hops were merchantable. He said that, only because of the mildew, they would not have been considered prime quality *in prior years* (i.e., when mildew was not the common characteristic of the Willamette Valley clusters), but he found that these were average for 1947, and that the mildew did not affect the lupulin, the valuable part of the hop (S.R. 180-183).

Mr. Bullis, the hop chemist, testified that the tests on samples from these clusters were at least average for the 1947 Oregon commercial lots tested by the Department of Agricultural

---

<sup>14</sup> Appellant's three experts were: Mr. Ray and Mr. Eismann, who were officials representing large dealer-litigants, and Mr. Hoerner, who conducted an unique experiment for appellant. Their testimony is considered in the Appendix, post, pp. xvii-xix.



Chemistry of Oregon State College (S. Ex. 36; S.R. 333-336).<sup>15</sup>

The record shows that, not only in isolated cases, but as a general practice in 1947, Oregon cluster hops showing some mildew such as these, and covered by "prime quality" contracts such as this, were in fact accepted in the trade.<sup>16</sup>

About September 10th one early sample of these hops had been sent appellant in New York (S. Ex. 45-A).<sup>16a</sup> Thereupon, and less than a month after

---

15 Three chemical tests were made on these clusters, one for Mr. Paulus (S. Ex. 25) and two for Mr. Smith (S. Exs. 36, 37). The analyses of these hops showed an average Alpha resin of 4.74, an average Beta resin of 9.31, and an average preservative value (using Mr. Bullis' formula, S.R. 333) of 78.4.

The Oregon commercial lots (S. Ex. 36) tested by the Department that year showed an average of 4.61 in Alpha resin; 8.75 in Beta resin; and 75.3 in preservative value.

With respect to such chemical analyses Mr. Oppenheim testified (S.R. 318): "I would say that all of the larger [breweries] and some of the smaller ones have their own laboratories. It is becoming more and more so."

In this case appellant made an issue concerning the value of these hops to its brewer customers (e.g., S.R. 322). Accordingly evidence on the inherent chemical value of the hops was proper. In other words, this case comes within the rule of *Wolf v. Edmunson*, 9 Cir., 240 Fed. 53, rather than *Netter v. Edmunson*, 71 Or. 604, 143 Pac. 636.

16 Such hops were readily taken by the breweries. As Mr. Willig, manager of the Oregon Hop Producers Cooperative, said with reference to Mr. Wellman's hops which also showed a touch of mildew (W.R. 152-153):

"Q. Would you say from your experience in selling hops over the years that hops of the same general character and quality of these had been accepted under this type of contract?

A. Yes, they had.

Q. In 1947 to whom did you sell your hops?

A. Directly to the breweries.

Q. Did you sell hops to breweries of the same general kind and quality as you have seen here in the courtroom?

A. That is about all we had to sell that year in the form of late hops.

Q. Did they accept them and make beer out of them?

A. That is right."

16a Another early sample sent at the same time was delayed, and was not received until October 14th (S. Ex. 43; S.R. 313).

he had signed the contracts in Oregon, Mr. Oppenheim from New York instructed Mr. Paulus to reject the clusters, take the fuggles, and charge the grower with the advances on both crops against the fuggle proceeds (S. Exs. 16, 17).

The two specific grounds stated for the purported rejection were "dirty picked" and "blighted" (S.R. 260; S. Exs. 16, 17). After receiving advice (S. Ex. 18) that the picking on the clusters was only 9% (i.e., within the percentage allowed by the contract, S.R. 12), appellant telegraphed Mr. Paulus (S. Ex. 21):

"Referring samples 14 and 64 Kilian Smith willing accept delivery Lot 14 fuggles but again advise you positively refuse accept delivery seventy-three bales Lot 64 [clusters] and instruct you to reject this lot and demand refund all advances or apply same on fuggle delivery  
\* \* \*."

Mr. Paulus then wrote appellant saying that in his opinion the sample on the basis of which the rejection was made<sup>17</sup> was "hardly representative of the entire lot," and asking for consideration of the additional samples he was sending (S. Ex. 22; S.R. 261). Appellant replied to Mr. Paulus by its form letter of September 30th refusing to accept the hops "as prime delivery" and suggesting that Mr. Paulus

---

<sup>17</sup> Appellant did not introduce this sample in evidence. On trial Mr. Paulus testified (S.R. 277):

"Q. Did they, the Loewi corporation, return the original type sample on the basis of which they rejected the crop?"

A. Yes.

Q. Is it among these?

A. No."

inspect and grade the hops and forward tenth bale samples (S. Ex. 27; and compare G. Ex. 17).

Mr. Fry caused Mr. Smith to sign the statement that the inspection and weighing in would not be considered an acceptance (S. Ex. 5). Mr. Fry told Mr. Smith that the statement had to be signed "before they could even touch the hops" (S.R. 123, 205, 216). The same "form" of inspection was conducted as in the Geschwill case (S.R. 123, 204-205, 215-216; S. Ex. 13; appellee Geschwill's brief, pp. 12-16). Mr. Oppenheim promptly thereafter sent Mr. Paulus his formal letter of rejection, claiming the same two specific grounds of "badly blighted" and "dirty picked" (S. Ex. 29).<sup>18</sup>

At that time the fuggles had not yet been formally accepted. Subsequently, on October 22nd, appellant telegraphed Mr. Paulus to "ship immediately" to a certain brewery, in the name of another dealer, some designated lots of fuggles including "entire Lot 14," i.e., the Smith fuggles (S. Ex. 30). Thereafter the fuggles were formally accepted, and Mr. Smith was tendered a check for the fuggle price less both the fuggle and the cluster advances, which check was marked "for Balance on contract delivery

---

<sup>18</sup> In view of the facts that appellant decided to reject the hops on the basis of a non-representative sample, that the claimed defect in picking was admittedly not true, that appellant was fully advised of the mildew before it made the contract and before it made the picking advance, and that there was no good-faith inspection of the crop in the warehouse, it appears that the real reason for the rejection was not as claimed. The real reason may have been based on such considerations as the fact that the Oregon production was larger than the dealer had expected and prices would therefore decline, or the anticipation that grain restrictions on brewers would curtail their demand for hops. See Appendix, post, pp. xv-xvi; appellee Geschwill's brief, p. 11, note 11.

59 bales fuggles” (S.R. 126-127; S. Exs. 9, 33-C). The tender was declined and the check returned (S.R. 127; S. Ex. 10).

### Summary of Argument

Appellee’s argument is directed to the two “ultimate issues” posed by appellant (Br. 5):

I. *Issue on quality of hops.* The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The findings are clearly supported by the evidence (Appendix, post, pp. xiv-xvi, xix-xx, xxiv-xxv). (This is in answer to appellant’s points I, II, and III, Br. 21, 23-38.)

The points relating to the particular core of this controversy (ante, pp. 11-12) are discussed under this issue.

II. *Issue on form of action.* The trial Court concluded that upon the facts of this case, where the seller fully performed and made a valid tender of the goods, the seller can recover the balance due on the contract in this form of action (S.R. 55). The trial Court’s conclusion is clearly supported in law. (This is in answer to appellant’s points IV, V, VI, VII, VIII and IX, Br. 21-22, 39-44.)

## I. ISSUE ON QUALITY OF THE HOPS

The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The finding is clearly supported by the evidence.

On this point appellant (Br. 23-38) has followed quite closely its argument in its brief (pp. 20-46) in the Geschwill case. Accordingly, in answer thereto, we incorporate by this reference the material on the corresponding point in appellee Geschwill's brief, pp. 19-45. The following discussion is supplementary to that material, and is particularly applicable to the controversy in this case.

A. *There was no "warranty" that the hops would be free of mildew.*

This point involves the application to the facts of this case of the following principle:

"\* \* \* a warranty in general terms is held not to cover defects which the buyer must have observed. This is a rule of interpretation and is based on an endeavor by the court to give effect to the intention of the parties." Williston on Contracts, Rev. Ed., §972.

The only defects claimed by appellant in purporting to reject these hops related to the picking and the mildew. The leaf-and-stem content was admittedly within the percentage allowed by the contract. (Appendix, post, pp. xiii et seq.) On brief appellant bases its objection to the hops on the remaining claim about mildew. Appellant contends (Br. 24, 37) that the general wording in the



“prime quality” clause of the contract constitutes a “warranty” of freedom from mildew.

We have seen in appellee Geschwill’s brief (pp. 21-37) that the terms used in the “prime quality” clause have distinctive meanings in the hop trade, and that in 1947 the trade in fact accepted hops showing such mildew as these under the standard “prime quality” contracts. But even assuming that the general language in the printed-form contract would usually imply freedom from mildew, upon the facts here it is clear that the parties did not intend any such meaning.

Here the buyer knew that the crop when harvested would in normal course show the mildew. The price to be paid was the ordinary market price for such hops. Nothing indicates that the parties contemplated any impossible attempt to harvest a small quantity of choice, completely mildew-free hops. (Appendix, post, pp. ii-ix.)

It cannot be assumed that the parties bargained either for a nullity, or for a mere option on the part of the buyer to take the hops if the resale market went up. They manifestly bargained for the type of crop which they knew existed—what may be termed prime quality 1947 hops showing some mildew.

The principle involved is illustrated by *Standard Cotton-Seed Oil Co. v. Excelsior Refining Co.*, 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386. There the contract called for “prime crude cotton-seed oil,”

but at the time the contract was entered into, late in the season, there could only be produced "prime cotton-seed oil of the season." The Court held that the article with respect to which the parties were contracting "was necessarily the kind of article which could be manufactured at that late time by the seller."

*B. Appellant relied on its own inspection, and cannot now claim a warranty.*

The trial Court found (Appendix, post, p. xxi):

"Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid."

The finding is supported by the evidence (Appendix, post, pp. xxii-xxiv).

Justifiable reliance is the essence of warranty. §71-112, O.C.L.A.; Williston on Contracts, Rev. Ed., §972. Here the buyer carefully inspected the crop, knew its condition, and relied upon its own judgment. The seller made no representation that the crop would be other than in fact it was. The seller delivered the very crop for which the buyer bargained, and the buyer cannot now claim a warranty to relieve it of its bargain. *Paul v. Salisian*, 87 Cal. App. 721, 262 Pac. 779; *Loose v. Flickinger*, 121 Cal. App. 77, 8 P. 2d 517; *Gonter v. Klaber & Co.*, 67 Wash. 84, 120 Pac. 533.

*C. Appellant cannot assert a claimed "warranty" which at the time the contract was made appellant led the grower to believe it would not assert.*

Appellant is now asserting a claim which it induced the grower to believe it would not rely upon. The grower carefully insisted that the buyer be fully advised as to the condition of the crop before contracting its purchase. As Mr. Smith testified (S.R. 172-174):

"I wanted him to definitely understand what the hops were like, and I wanted him to definitely take that advice to his principals. \* \* \*

"I wanted him to know so he could tell me whether he wanted to buy them or not to buy them. I wanted him to tell me that. \* \* \*

"It was my opinion that they had mildew, and if that had anything to do with it they can always find something—some basis of rejecting hops when the market slips down. And they definitely had mildew and they knew it."

Mr. Fry made the inspection, conferred with his principal, returned to Mr. Smith's hopyard, told him they did want to buy the crop, and signed him up on a sales slip.

This contract was made, not in the spring of the year, but in the fall just before harvest. The hops were then formed on the vine and their condition was apparent to the buyer when it made its inspection.

As soon as the appellant signed the grower up on the sales slip he became contractually obligated

with respect to the specific crop, even though the crop had not yet been harvested and a more formal contract was to be made. *Hugo V. Loewi v. Long*, 76 Wash. 480, 136 Pac. 673. There was no mere option on the part of the grower. Likewise, neither the sales slip nor the subsequent mortgage-contract was a mere option on the part of the buyer. *Gonter v. Klaber & Co.*, 67 Wash. 84, 120 Pac. 533; *Livesley v. Johnston*, 45 Or. 30, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647; *Wigan v. La Follett*, 84 Or. 488, 165 Pac. 579.

If at the time of the contract the buyer thought it would take the cluster crop if the Oregon production was short, but otherwise would take the fuggles and reject the clusters, the buyer certainly did not communicate such thoughts to Mr. Smith.<sup>18a</sup>

Having induced the grower to believe that it would not rely upon such a claimed warranty, and having caused him in reliance thereon to enter into the contract and to obligate himself to perform at substantial expense, the buyer should not now be heard to assert a contrary claim. *Lilienthal v. Cartwright*, 9 Cir., 173 Fed. 580, 584; *Marshall v. Wilson*, 175 Or. 506, 518, 154 P. 2d 547.

D. *The buyer is estopped by its subsequent conduct from asserting any such claimed "warranty."*

The contract provides that if at or during picking time the crop is not in condition to produce

---

<sup>18a</sup> The Oregon statute (§2-222, O.C.L.A.) provides: "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail, against either party, in which he supposed the other understood it; \* \* \*"



the quality of hops called for, the buyer is discharged from the obligation to make its picking advance. At the time such an advance is made the buyer "must pass an honest judgment as to whether or not the crop is in the proper condition" for the production of such a crop of hops as is bargained for. *Livesley v. Johnston, supra*, 45 Or. at 48. It is not disputed that at the time of picking the buyer knew that the crop when picked and baled would show the mildew. Nevertheless, the buyer made the advance in a sum greater than the contract called for, and instructed the grower to continue the picking. (Appendix, post, pp. ix-x.)

Appellant argues (Br. 34-36) that it did not bargain for this specific crop, that the seller "assumed the risk" of harvesting a mildew-free crop, and that if the buyer was not tendered choice hops there would be a "failure of consideration." Counsel say (Br. 35), even if appellant knew at the time of the contract that the harvested crop would in normal course show such mildew, the doctrine of existing unknown impossibility, or indeed of supervening impossibility, would excuse the buyer from performance.<sup>19</sup> In essence appellant's argument (Br. 32, 34-35) seems to be that it must be conclusively presumed the parties contracted for the impos-

---

<sup>19</sup> Appellant's authorities are (Br. 35):

Restatement of Contracts, §456, which deals with existing impossibility of which the promisor neither knows nor has reason to know.

Restatement of Contracts, §281, which deals with destruction of subject-matter *after* the contract is made.

Williston on Contracts, Rev. Ed., §838, which deals generally with excusable supervening impossibility.



sible, but the buyer had an option to accept less than the impossible in performance.

It is believed appellant's argument is without basis in the facts. But in any event it relates to the time the contract was made. Even assuming the buyer then had an excuse, the excuse no longer existed after the buyer, knowing the manner of picking and the condition of the hops which had been picked, instructed the grower to continue picking and elected to make the harvesting advance. "The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to." Williston on Sales, Rev. Ed., §191c; Williston on Contracts, Rev. Ed., §688.

E. *The hops were merchantable.*

The trial Court found (Appendix, post, p. xiv):

"Said 1947 crop hops produced by plaintiff on said premises and tendered to the defendant under said contract were merchantable."

The finding is supported by the evidence (Appendix, post, pp. xix-xx).

The contract price here was the ordinary market price for Oregon cluster hops; and the market price for cluster hops was discounted from the market price for the mildew-resistant fuggles. These were

good average cluster hops such as were bought and sold at that market price (Appendix, post, pp. xix, xx, xxiv, xxv).

Mr. Oppenheim testified:

“We are not specialists in any better than ordinary hops. We are handling the same hops as the other people do.” (S.R. 308.)

“\* \* \* we simply sell hops as good hops.” (G.R. 452.)

Appellant purchases hops to resell to brewers, and the evidence is that these hops were of good brewing value (ante, pp. 20-21, and Appendix, post, xvi).

When the buyer was tendered these hops for the ordinary price, the buyer had all it bargained for.

*E. According to the custom of the hop trade these were prime quality 1947 Oregon cluster hops.*

The trial Court found (Appendix, post, p. xxi):

“Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.”

The findings are supported by the evidence (Appendix, post, xiv-xvi, xix-xx, xxiv-xxv).

In essence appellant requests this Court to re-try the case on this sole factual issue (Br. 37). We submit (1) that, independently of this point, the

judgment is supported on the other grounds discussed above, and (2) that the trial Court's findings and the supporting evidence on this issue are equally determinative. Rule 52(a), Federal Rules of Civil Procedure; *Seidenberg v. Tautfest*, 155 Or. 420, 426, 64 P. 2d 534.

## II. ISSUE ON FORM OF ACTION

**Appellee, having fully performed the contract, and having made a valid tender of the hops, can maintain this action to recover the balance due on the contract.**

On this point the form of contract is the same as in the Geschwill case and the surrounding circumstances are substantially similar. Appellant (Br. 39 et seq.) has adopted its argument on the point from its brief in the Geschwill case. In answer thereto, we incorporate by this reference the material in appellee Geschwill's brief, pp. 46-75.

## CONCLUSION

The core of the controversy in this case is whether upon the facts appellant can assert a claimed warranty of freedom from mildew based on the general language about "prime quality" in the printed-form contract. We submit:

(a) The parties intended no such "warranty" because at the time the contract was made the hops were known to be mildewed, and at that time only prime quality clusters showing such mildew could be produced.

(b) Appellant relied on its own inspection of the crop, both before making the contract and also before making the advance payment and instructing the grower to continue picking. The essence of warranty is justifiable reliance, and appellant did not rely upon any such "warranty" as now claimed.

(c) The grower insisted upon the buyer having full knowledge of the condition of the crop before making the contract. Appellant then induced the grower to believe that it would not rely on any such claimed "warranty." Appellant should not now be heard to say that it had a secret reservation and then intended to assert such a claimed "warranty" if it subsequently decided not to accept the crop bargained for.

(d) The grower was caused to complete his performance at substantial expense in reliance upon the buyer's acts in making the harvesting advance payment and instructing him to continue picking. The buyer then had full knowledge of the manner of picking and of the mildew which appeared in the picked hops. The buyer was thereby estopped from asserting any excuse which it may previously have had on the ground of mildew.

In addition to, and independent of, the foregoing points, we submit that in any event these were merchantable hops, of good brewing value, and of "prime quality" in that they were equal to the average of cluster hops actually accepted in the

Oregon trade that year under this standard type of "prime quality" provision.

We respectfully submit that the trial Court's findings are clearly supported by the facts, that the Court's conclusions are sound in law, and that the findings and conclusions support the judgment.

Respectfully submitted,

ROY F. SHIELDS,

RANDALL B. KESTER,

WILLIAM E. DOUGHERTY,

*Attorneys for Appellees.*

Portland, Oregon

July 29, 1950.





## APPENDIX A

*Explanatory Note:* This appendix consists of the trial Court's findings of fact (S.R. 48-54), references to appellant's specifications of asserted error (Br. 13-18), and citations to the supporting evidence. The portions of the findings which are questioned by appellant are printed in italics, and the number following each italicized portion corresponds to the number of appellant's asserted error relating thereto.

---

**Finding** "1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of New York."

*Asserted error:* None.

**Finding** "2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00; and this Court has jurisdiction of the subject-matter, the parties and the cause of action."

*Asserted error:* None.

**Finding** "3. On or about August 19, 1947 plaintiff as seller and defendant as buyer entered into the written cluster hop agreement received in evidence herein. *By said agreement plaintiff contracted to sell and defendant contracted to buy the entire crop of cluster hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon.*<sup>1</sup>

*Pursuant to said contract plaintiff cultivated and completed the cultivation of said premises and duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner.”*<sup>2</sup>

*Asserted error No. 1 (Applt’s Br. 13) to finding that the parties bargained for the “entire crop”.* This finding uses the contractual language (S. Ex. 1; S.R. 10):

“\* \* \* the seller does hereby bargain and sell, and \* \* \* agrees to deliver \* \* \* to the buyer, \* \* \* *entire crop estimated at - - - ten - - - thousand pounds (10,000 lbs.) of cluster* \* \* \* hops grown on said premises \* \* \*” (The italicized matter was typewritten on the printed form contract.)

The printed clause to which appellant refers is (S. Ex. 1; S.R. 12):

“\* \* \* the buyer \* \* \* is to have the right to inspect the same before acceptance, and to accept any part less than *the whole of the hops so bargained for*, should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and tendered for acceptance be less than the amount herein bargained and sold; \* \* \*” (Italics ours.)

Thus, the parties contracted with respect to the “entire crop,” although the buyer might elect, upon a certain condition, to take less than the entire crop. This condition did not occur (post, pp. xiv-xvi, xix-xx, xxiv-xxv).

*Asserted error No. 2 (Appl’s Br. 13-14) to finding that the cluster hops were properly harvested.* Appellant’s objection to this finding is that the baled

hops showed mildew. The objection assumes that the parties contemplated Mr. Smith would pick the clusters burr-by-burr to eliminate any trace of mildew, and that otherwise the harvesting would not be proper.

At the time the contract was made the buyer knew that, by the nature of the picking process, the harvested crop would show some mildew coloration (post, pp. v-viii, x), just as the buyer knew the baled hops would contain some leaves and stems (post, p. xiv). As the dealer's representative Mr. Fry said, speaking of the time when he inspected the picking baskets in the field and had Mr. Smith continue harvesting (post, pp. x, xxiii-xxiv), "Naturally there were red hops in there \* \* \*" (S.R. 149, 212).

Such burr-by-burr picking was not in fact practiced in the hop business and was not feasible if possible at all (W.R. 100, 124, 227, 302; S.R. 149).

The hops when baled showed less mildew than they did in the field when the purchase was contracted, because Mr. Smith had the yard picked "selectively" in the sense that he instructed the pickers to skip the vines showing any bad mildew (S.R. 133-135). And the pickers did so. As Mr. Smith explained (S.R. 102):

"\* \* \* if there were a lot of small hops, undeveloped hops or nubbins, as they were called, on a vine, the picker would naturally pass them up because it would not make any weight in his basket.

"However, there were hops with good clusters on, long strippers, and there might have been a few mildewed hops along with them that na-

turally went into the basket, but, in general, the heaviest branches, the heaviest infested branches, were passed up, and we estimate that they left about 25 per cent of the hops on the vines. There were some on all the vines that they left.”

**Finding** “4. As a part of the same transaction plaintiff and defendant entered into another contract whereby plaintiff contracted to sell and defendant contracted to buy certain fuggle hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon. Plaintiff duly performed all the terms and conditions on his part to be performed under said contract, and defendant received and accepted said fuggle hops, which consisted of 59 bales weighing 10,986 pounds net, at the price of 91 cents a pound. Against the total price of \$9,997.26 was applied the advance payment of \$3,500.00 made pursuant to said fuggle contract. The remaining balance was \$6,497.26. On October 25, 1947 defendant tendered plaintiff its check in the amount of \$3,497.26, bearing a notation that it was ‘for Balance on contract delivery 59 bales fuggles.’ In arriving at said amount defendant deducted the cluster contract advance hereinafter referred to. Plaintiff refused to accept the check because of the stated condition. Defendant did not at any time pay or offer to pay plaintiff without such condition said balance of \$6,497.26 due under said fuggle contract, or said sum of \$3,497.26, or



any other sum, and said balance remains due and unpaid.”

*Asserted error:* None.

**Finding** “5. In 1947 there was, and defendant knew that there was, widespread mildew in cluster hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop contract shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. Before entering into said cluster hop agreement defendant inspected said cluster hop crop and *defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled.*<sup>3</sup> Such mildew in said hops did not become more prevalent or pronounced after said agreement was entered into.”

*Asserted error No. 3 (Applt's Br. 14, 33-34) to the finding that appellant knew the hop crop would in normal course show some mildew when picked and baled.* This involves the same matter as uncontested Finding 7 (post, pp. ix-x), and asserted error 2 (ante, pp. ii-iv). Appellant's three objections to the finding, and the evidence relating thereto, are:

(a) Appellant suggests (Br. 33) that it could not have known that the baled crop would show some mildew because the mildew in 1947 was unusual.

Mildew itself is not unusual. As Mr. Oppenheim, president of appellant, said (G.R. 427), “We have had plenty of other attacks.” The mildew in 1947 was uncommon because it was so widespread (G.R.

245), and because it came on so late in the season. As Mr. Noakes, another dealer's representative, explained (W.R. 340):

“\* \* \* it was very evident that there was going to be a right considerable amount of damage in the yards, mildew in most of the yards around the state; not all of them, but most of the yards around the state, and 1947 was unusual in this respect, that this mildew came on, this mildew attack came late in August, when under ordinarily circumstances we would have very dry weather in which mildew does not work, but it did happen that this was a very rainy August and it brought this attack on. It had not happened that way to any extent any time before, nor since.”

Mr. Oppenheim, speaking of the general condition of the Oregon yards early in August (G.R. 427), observed that the “hops were attacked in the bloom stage or burr stage and showed serious damage by downy mildew.” That observation of Mr. Oppenheim's before harvest was confirmed later when he saw samples from the baled hops. He said (G.R. 439): “Well, I would say at least two out of four, maybe three out of four samples showed evidence of blight, some very serious, some in varying degrees.”

Appellant was fully advised as to the unusual conditions (S.R. 255-256). Early in the 1947 hop-growing season the prospects were for a full Oregon crop (S.R. 190-191; W.R. 305). When the rainy weather in the summer brought on the mildew (G.R. 369), the hop buyers became concerned about a crop shortage. As Mr. Walker explained (G.R. 245-246), most of the Eastern hop dealers paid a visit

to the Oregon hop district to get first-hand information.

Mr. Oppenheim came out to Oregon to inspect the hop yards "when the downy mildew infestation was at its height" (G.R. 426). After making an inspection trip through the hop-producing section of the Willamette Valley (S.R. 208, 310), Mr. Oppenheim gave Mr. Paulus "orders to buy a few hundred bales additional of hops, and we agreed to take clusters as well as fuggles" (S.R. 310). Pursuant to those orders, Mr. Fry was authorized to, and did, negotiate the contract for the purchase of Mr. Smith's hops (S.R. 195, 228-229, 243-245).

On brief (p. 33) it is admitted that before entering into the cluster hop contract appellant inspected the crop and knew that it showed mildew. (And see S.R. 105, 211.) Mr. Oppenheim signed the contract for the purchase of these hops while he was still in Oregon (S.R. 230).

(b) Appellant suggests (Br. 33-34) that it did not know that the baled hops would in the normal course show such mildew because appellant did not know which particular hop cones would be picked.

But appellant did know that some of the touch of mildew, which it knew was general through the yard (S.R. 196), would show in the hops when picked and baled. Mr. Noakes, a dealer's representative, testified (W.R. 318):

"Q. Would it be proper to say that the harvested hops showed the same mildew that the hops in the field had been showing for the past two months?

A. If it was in the field, it would show in

the samples unless—if it was general in the yard, it would show in the sample, yes.”

Mr. Haas, vice-president of the other appellant, explained that on its own yard his corporation had the cluster hops picked with the greatest care (“absolutely hand-screened”), but even so the baled hops showed some mildew and 10% leaves and stems (W.R. 455-456, 465). (Mr. Smith’s clusters had only 9% leaves and stems, S. Ex. 14.)

Mr. Walker, a grower with one of the larger hop operations in the state (G.R. 243), testified that his crop also had mildew in 1947 and that “naturally” some mildewed nubbins “would have to be” in the baled hops (G.R. 283).

With reference to the picking of these particular hops, Mr. Smith said (S.R. 102), “there might have been a few mildewed hops along with them that naturally went into the basket.” And Mr. Fry said (S.R. 212), “Naturally there were red hops in there.” Mr. Smith reported his conversation with Mr. Fry, who was out in the yard inspecting the picking, as follows (S.R. 149):

“We were discussing the general amount of blight in hopyards of the Valley, and he [Mr. Fry] stated at that time that he didn’t see how we could get away from getting some blight in.”

(c) Appellant suggests (Br. 34) that the actual harvest of 73 bales, when compared with Mr. Fry’s and Mr. Smith’s pre-harvest estimate of 50 bales, is some evidence that the picking was not sufficiently selective.

When Mr. Fry signed Mr. Smith up on the sales slip and purchased his cluster hops (S.R. 195), the purchase was of the “entire crop” (S. Ex. 2). Even



though the entire crop was contracted for, however, it was necessary to have an estimate for the purpose of computing the harvesting advances of a specified amount per pound (S.R. 13, 15).

Mr. Fry and Mr. Smith mutually agreed on an estimate of 10,000 pounds, or about 50 bales (S.R. 138). It was strictly an estimate for, as Mr. Oppenheim said (G.R. 453), "Nobody in the world can guess a hop crop until it is in the bales." Mr. Smith said that the low estimate was intentionally conservative, so that he could be sure to deliver at least that amount (S.R. 138-141).

Mr. Fry inspected the actual picking, instructed Mr. Smith to continue, and made a larger harvesting advance than the contract called for. (See uncontested Finding 7, post, pp. ix-x; S.R. 174-175, 213-215.)

**Finding** "6. By said cluster hop agreement defendant contracted to make an advance payment to plaintiff of \$2,500.00 in order to enable plaintiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. The agreement provided that defendant would have a prior lien upon said hop crop for any such advance payment, in accordance with the chattel mortgage provisions of said agreement."

*Asserted error:* None.

**Finding** "7. Said cluster hop agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defend-



ant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops, and that said crop when picked and baled would in normal course show such mildew. On or about August 26, 1947, defendant again inspected said hop crop during picking and before making the advance, and thereupon defendant elected to and did make the advance payment in the sum of \$3,000.00, a larger amount than called for by the contract. Any defect which said hop crop may have had by reason of blight or mildew was apparent to defendant at the time of said inspection. Defendant at that time instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance upon defendant's said instruction and advance payment. The mildew in said crop did not thereafter become more pronounced or prevalent."

*Asserted error:* None.

**Finding** "8. *Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state<sup>1</sup> and delivered the same in warehouse at the place and within the time agreed upon in said contract. On or about September 15, 1947, after said cluster hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant, delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said cluster hops and set same aside for defendant.*" Thereafter, defendant

inspected, sampled, marked and weighed said hops at that warehouse. The bales of hops constituting said crop were identified, segregated and *appropriated to the contract*.<sup>5</sup> *Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed.*"<sup>6</sup>

*Asserted error No. 4 (Appl't's Br. 14) to finding that the grower did everything required to put the hops in a deliverable state.* Appellant's objection here—that the harvested hops showed some of the same mildew which the hops in the field had shown—is the same point considered ante, pp. ii-iv, v-ix, ix-x.

*Asserted error No. 5 (Appl't's Br. 14-15, 41-42) to finding that grower, with buyer's assent, delivered the hops at warehouse and set them aside for defendant.* Pursuant to the contract (S.R. 10), Mr. Smith delivered the hops to the Oregon Electric warehouse in Salem, and that place was acceptable to the buyer (S.R. 251). There the buyer's representative inspected, sampled, marked and weighed in the bales (S.R. 203-205, 215-216).

Appellant's objection to this finding concerns the legal significance of the word "assent". This legal question is discussed in appellee Geschwill's brief, pp. 58-60.

*Asserted error No. 6 (Appl't's Br. 15) to finding that appellee duly performed conditions precedent.* Appellant's contention here is only that, "if the contract is construed in the manner advocated by the defendant" (Br. 15), the hops did not conform in quality to the contract. The substantial evidence that the hops did conform to the contract is referred to post, pp. xiv-xvi, xix-xx, xxiv-xxv.

**Finding** "9. Said cluster hops so weighed by defendant consisted of 73 bales, and had a total net weight, as determined by defendant, of 14,103 pounds. Said hops contained nine per cent leaves and stems and six per cent or more of seeds, as determined by an authorized governmental agency in accordance with said agreement."

*Asserted error:* None.

**Finding** "10. Said agreement provided that the price to be paid for the hops to be delivered would be the grower's market price for the kind and quality of hops delivered containing eight per cent of leaves and stems and six per cent or more of seeds, and that in the event the leaf and stem content exceeded eight per cent then the market price would be reduced one cent per pound for each one per cent increase of leaf and stem content to and including ten per cent. Pursuant to said contract, on or about September 18, 1947, plaintiff selected as the sale price for said cluster hops said grower's market price at that time which was 85 cents a pound, and duly notified defendant in writing thereof. Since the leaf and stem content was nine per cent, the contract price for said cluster hops was 84 cents a pound. The total contract price of said cluster hops was \$11,846.52."

*Asserted error:* None.

**Finding** "11. Upon delivery as aforesaid plaintiff duly tendered said entire crop of cluster hops to defendant in warehouse at the place specified

in said agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof except said partial advance payment. Said hops, as defendant knew, continued to be and are still held by the warehouseman. Defendant at all times has known that it could obtain said hops upon payment of the balance of said purchase price.”

*Asserted error:* None.

**Finding** “12. On or about October 16, 1947, defendant rejected and refused to pay for said cluster hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay for said hop crop on the particular ground that said cluster hops were blighted and dirty picked, and on no other specific ground. *By the term ‘blighted’ it was meant that the hops showed some mildew effect*’ as stated above, and by the term ‘dirty picked’ it was meant that the hops contained over the average eight per cent leaf and stem content. *At the trial defendant advanced the same specific objections to the hops.*<sup>8</sup> *Upon the facts neither claimed defect was material.*<sup>9</sup> Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same, or when defendant elected to make the advance payment, or when defendant instructed plaintiff to continue



picking. The leaf and stem content was within the tolerance allowed by the terms of said agreement. Said 1947 crop hops produced by plaintiff on said premises and *tendered to the defendant under said contract were merchantable.*"<sup>10</sup>

*Asserted error No. 7 (Br. 15, 31) to finding that "blighted" refers to mildew.* Mr. Oppenheim testified (S.R. 318), "badly blighted means mildew damage. It is the blight from the mildew." Appellant's counsel (Br. 9) explain the term "badly blighted" as "meaning damaged by mildew."

Appellant's objection to this finding is (Br. 15), "the undisputed evidence establishes that the defendant rejected the plaintiff's hops because of substantial damage by mildew." Such is not the undisputed evidence. Appellant assigned two reasons for the purported rejection; neither was true in fact; and the inference is that neither was the real reason.

(a) *Claimed grounds for rejection.* Upon the basis of one early type sample (S.R. 313), which in the opinion of Mr. Paulus was "hardly representative of the entire lot" (S.R. 261; S. Ex. 22), and which appellant did not introduce in evidence (S.R. 277), appellant determined to reject the hops upon the two stated grounds that they were "dirty picked" and "badly blighted" (S.R. 260).

(b) *Neither claimed ground was true in fact.* By the official analysis the picking was only 9% (S. Ex. 14) which was within the percentage allowed by the contract (S.R. 12). On trial Mr. Oppenheim admitted (S.R. 314) that the picking conformed to the contract.



As appellant knew when it contracted the purchase, when it made the harvesting advance, and when it instructed appellee to continue picking the crop (ante, pp. ii-x), the hops showed some mildew. But the mildew did not damage the lupulin, which is the valuable part of the hop (S.R. 182, 130). In other words, there was mildew, but there was no "substantial damage."

(c) *Real reasons for rejection.* Upon the basis of the early non-representative type sample (S. Ex. 22) appellant determined to reject the hops upon the claimed grounds of picking and mildew (S.R. 260). Upon receiving notice of the official analysis showing the picking to be within the percentage allowed by the contract (S. Ex. 18), appellant telegraphed Mr. Paulus (S. Ex. 21), "again advise you positively refuse accept delivery seventy-three bales Lot 64 and instruct you to reject this lot and demand refund all advances or apply same on fuggle delivery." Mr. Paulus suggested a fair examination and sent additional samples (S.R. 316; S. Ex. 22). Appellant then still refused to accept the hops but suggested that they be inspected and 10th bales samples forwarded (S. Ex. 27). A "form" inspection (G.R. 463-464) was conducted (S.R. 215-216); and appellant rejected them on the same specific claims of "badly blighted" and "dirty picked" (S. Ex. 29).

In view of the fact that appellant was fully advised about the mildew, that the claimed defect in picking was admittedly not true, and that no good-faith inspection of the baled crop was made, the Court could properly infer that appellant actually attempted to reject the hops for other reasons. The record indicates that the real reasons may have

included such considerations as the fact that the Oregon crop was not as short as appellant had expected and the market would undoubtedly fall off (S.R. 119, 173; G.R. 245-247, 265, 453), or that grain restrictions on brewers would curtail their production and thereby reduce the demand for hops (S.R. 323; W. Ex. 3-U), or that the prospect of a lowered tariff on imported hops would affect the market for domestic hops (S.R. 324).

*Asserted error No. 8 (Appl't's Br. 15-16) to finding that on trial appellant made the same specific objections (to picking and mildew).* Appellant objects to this finding upon the ground that on trial it claimed "substantial" mildew rather than "some" mildew.

As to the degree of mildew, appellant does not contest the finding that the crop of hops was not any more blighted or mildewed than when appellant contracted to buy the same, or when appellant elected to make the advance payment, or when appellant instructed appellee to continue picking (ante, pp. ii-x).

In brewing value these cluster hops were at least average for the 1947 Oregon commercial lots tested at the Department of Agricultural Chemistry of Oregon State College (S. Ex. 36; S.R. 333-336). Mr. Cornoyer, the independent hop dealer, found that the mildew in the hops did not affect the lupulin, that the hops were merchantable, and that they were average for 1947 (S.R. 181-183). Mr. Aman, the hop grower, found that these hops were somewhat better than the general average in that year (S.R. 189-190).

Opposed to the testimony of the chemist, the independent hop dealer and the hop grower, appellant offered the testimony of two officials representing large dealer-litigants and the results of Mr. Hoerner's unique experiment. Appellant's witness, Mr. Ray, president of the corporation representing appellant John I. Haas, Inc., testified (S.R. 283):

“\* \* \* these being old samples, I based my opinion upon mildew damage only, which in my opinion was sufficient to disqualify the hops as prime quality.”

(The evidence on Mr. Ray's personal opinion as to what constitutes prime quality, and the variance of his opinion from the trade practices, are discussed in appellee Geschwill's brief pp. 28-29, and the Appendix to that brief, pp. xviii-xix.)

Appellant also offered the opinion of Mr. Eismann, who is in charge of the Oregon district for S. S. Steiner, Inc. (S.R. 285), which was then also involved in hop litigation in the State courts concerning the 1947 crop (W.R. 385), and which is the other of the three large hop buyers (G.R. 252, 447; S.R. 288). Mr. Eismann testified from the samples (S.R. 289) that it was impossible for him to judge what the hops might have been as fresh hops but that they were in his opinion not prime because of dirty pick and mildew.

The third of appellant's witnesses on quality was Mr. Hoerner who testified about an unprecedented experiment (S.R. 272) which he had made at appellant's request (S.R. 267). To represent a crop of 14,103 pounds (ante, p. xii), he used a sample of much less than one ounce (15.2 grams, S.R. 268). Pursuant to his instructions, he separated out each

cone showing any slightest trace of mildew and called it an "infected" cone (S.R. 270). By that method he was able to say that the minute sample contained a high percentage by weight of "infected" cones (S.R. 268), but still less than the percentage of "infected" cones on the vines at the Oregon State College model yard that year (S.R. 270).

Mr. Oppenheim testified (S.R. 316) that the brewing value of a matured cone which was a little red from mildew on the outside was not impaired, and that it would be necessary to determine the degree of mildew of each burr to determine whether the brewing value was impaired. However, Mr. Hoerner testified as to his unique experiment (S.R. 270), "I wasn't requested to make any separation of degree of infection."

Even Mr. Oppenheim repudiated the results of the Hoerner experiment. Mr. Oppenheim testified (S.R. 318-319):

"Q. You were here when Dr. Hoerner testified?

A. Yes, sir.

Q. He testified that any burr which showed the slightest trace of mildew on one petal was in his classification an infected burr. Now, do I understand you to say that such a burr, where there is just a slight trace of mildew on a petal, the brewing quality of that probably would not be affected?

A. That would be my judgment, that the hop outside of a little discoloration on the outside is not seriously damaged. If they were all like that, the damage would be considered very



slight and probably would not impair the value of the hops or the brewing value, as you express it.”

*Asserted error No. 9 (Appl't's Br. 16, 31-32) to finding that neither claimed defect was material.* Both Mr. Oppenheim (S.R. 314) and Mr. Paulus (S.R. 260) admitted that the picking conformed to the contract.

The mildew was not material because:

(a) The buyer was fully advised concerning the mildew before it contracted the purchase, before it made the picking advance, and before it instructed appellant to continue picking (ante, pp. ii-x).

(b) The mildew did not damage the brewing value of the hops (ante, pp. xvi, xviii-xix).

(c) These hops were merchantable (post, pp. xix-xx). This was a market-price contract (S.R. 11), and the market had adjusted to the mildew by providing a 5 cent discount for the cluster hops susceptible to mildew, as compared with the mildew-resistant fuggle hops (S.R. 240, 311).

(d) These hops were at least the average of those actually accepted in the trade under such contracts that year (post, pp. xxiv-xxv).

*Asserted error No. 10 (Appl't's Br. 16, 29-31) to finding that the hops were merchantable.* The independent hop dealer, Mr. Cornoyer, testified that the hops were merchantable (S.R. 181). There is no evidence to the contrary.

Appellant's counsel (Br. 16, 29-31) do not contest the fact that the hops were merchantable, but rather argue that the finding is irrelevant. This Court in the similar hop case of *Wolf v. Edmun-*



son, 240 Fed. 53, 59, regarded the "merchantable quality of the hops according to the custom of the hop trade" as the "real question of fact for determination." The evidence is that according to the custom of the hop trade in 1947 such hops as these were in fact accepted under contracts such as this (post, pp. xxiv-xxv).

Appellant (Br. 16) misconstrues "merchantable" to mean "salable at some price." The finding uses "merchantable" in its usual acceptation: "Fit for sale; vendible in market; of a quality such as will bring the ordinary market price." (Black's Law Dict., 3d Ed.)

The buyer's printed-form contract here was qualified by the buyer's mimeographed form rider attached to it. The rider provided (S. Ex. 1; S.R. 20): "The price to be paid for the hops to be delivered shall be the Grower's market price for the kind and quality of hops delivered \* \* \*" with the usual premiums and discounts. The ordinary market price for good merchantable hops such as these was 85 cents a pound, which was the market price selected by Mr. Smith (W.R. 255; S.R. 192-193; ante, p. xii).

The majority of Oregon cluster hops that year showed mildew (ante, pp. v-vii). The ordinary market price had adjusted to that fact, in that the market price for cluster hops, being susceptible to mildew, was 85 cents, while the ordinary market price for fuggle hops, being resistant to mildew, was 90 cents (S.R. 240, 311).

See also appellee Geschwill's brief, pp. 31-34, and Appendix thereto, pp. xv-xvii.

**Finding** “13. Plaintiff delivered the identical cluster hop crop which defendant contracted to buy.<sup>11</sup> Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid.<sup>12</sup> Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions.<sup>13</sup> Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.”<sup>14</sup>

Asserted error No. 11 (Appl’ts Br. 16-17) to finding that appellee delivered the identical cluster hop crop which appellant contracted to buy. By the terms of the contract (S.R. 10) “the seller does hereby bargain and sell” the entire crop of cluster hops from a designated farm, and agrees to deliver them. Likewise, by the terms of the contract (S.R. 12) the “buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor \* \* \*

It is admitted on the pleadings (S.R. 4, 41) that “said hops were placed in storage” and “were there made available to the defendant for inspection.” The finding is not contested that appellee “delivered the same [the specific crop of cluster hops] in warehouse at the place and within the time agreed upon in said contract.” (Ante, p. x.)

At the time the contract was made the hops were formed and in existence on the vine. As Mr. Smith said (S.R. 138):

“Most of the hop burrs were fully developed at that time. They were still a little tender; they had not fully matured.”

Mr. Fry agreed that the hops “were already formed” (S.R. 196).

This was a sale of specific goods. (See appellee Geschwill’s brief, pp. 6, 39-40, 58-59.)

*Asserted error No. 12 (Applf’s Br. 17, 32) to finding that appellant did not rely on any warranty that the hops would be other than they actually were when tendered and delivered.* The contractual warranty (S.R. 11) does not mention mildew, but appellant asserts (Br. 26) that because the hops showed mildew they did not meet the general terms of the “warranty”.

There is evidence that the hop trade that year did not in fact interpret the general language of the standard form of contract to require freedom from mildew. (See appellee Geschwill’s brief, pp. 21-30; and post, pp. xxiv-xxv.)

Appellant points to no evidence that it expected to receive hops without mildew. Counsel simply say that this must be “conclusively presumed” (Br. 32).

The evidence is that appellant was fully advised about the mildew. Mr. Smith insisted that appellant be fully advised, because, as he testified (S.R. 174):

“It was my opinion that they [the cluster hops] had mildew and if that had anything to do with it they [the Eastern dealers] can always

find something—some basis of rejecting hops when the market slips down. And they definitely had mildew and they knew it.”

Speaking of Mr. Fry’s visit to the yard before purchasing the hops for appellant, Mr. Smith said (S.R. 147):

“Well, he stated he wanted to buy hops, and I says, ‘Well, let’s go out and look at them.’ I says, ‘I have got some mildew.’ And he says, ‘Well, I know; they are infected all up and down the Valley. I have been running around looking at hopyards during the past week with Mr. Oppenheim.’ I says, ‘Well, you better come back and take a look at mine, then, and get an idea that you can talk to him about and tell him what they are like.’ And he didn’t want to go back, and I insisted because I wanted him to know what he was buying. So he did. We walked back there, and I purposely took him through. We crossed and crisscrossed all through the yard.”

Mr. Fry went back to talk to Mr. Paulus about it and subsequently signed Mr. Smith up on the sales slip (S.R. 210-211).

Mr. Fry thereafter inspected the hops during picking (S.R. 110-113, 174-175, 213). The contract provided that if at the time of picking the hops would not produce the quality called for by the contract the buyer would be discharged of its obligation to make the harvesting advance payment (ante, pp. ix-x). Mr. Fry told Mr. Smith that he would look at the hops and if they were about the same as they had been before he would make the advance (S.R. 214). Mr. Fry examined the pickers’



baskets ("Naturally there were red hops in there," S.R. 212), and told Mr. Smith that he thought the picking was a little rough, i.e., too many leaves and stems (S.R. 217). Mr. Fry then made a harvesting advance in a sum larger than called for by the contract (S.R. 215). As Mr. Smith testified (S.R. 174-175):

"He [Mr. Fry] said, 'Sure, we want you to pick them.' He says, 'If you need more money, call us and we will give you some more.' He said if I had to go to six or seven cents a pound [green weight for picking], why, feel free to ask for more money. \* \* \*

Q. And that is the time that you say he told you to pick?

A. Yes; he saw how we had been picking and he saw what had been picked."

And see ante, p. x.

*Asserted error No. 13 (Appl't's Br. 17) to finding that the hops conformed to the quality provisions of the contract as those provisions were actually applied in practice.* The evidence is that in 1947 all grower-dealer contracts called for one standard grade of "prime quality" (G.R. 283-284, 357, 452, 486). The evidence also is that the great part of the 83,000 bales of Oregon hops that year moved in the trade under such contracts, and that nearly all the cluster crops showed mildew (G.R. 250-251, 269, 394; W.R. 152-153). It seems self-evident that hops with a touch of mildew such as these were in fact accepted in the trade as "prime".

Mr. Cornoyer, the independent hop dealer, testified that these hops would not have been considered



“prime” in prior years because of the mildew (S.R. 180-181). But he testified that, while the majority of crops showed mildew, he took in all of the sixteen crops he had under contract that year, amounting to about 2500 bales, with a reduction in price in only one case (S.R. 183, 184). He found that these hops were merchantable, and that the mildew did not affect the lupulin (S.R. 181).

Mr. Cornoyer’s experience was typical. The record abundantly shows that as a general practice in 1947 cluster hops with a touch of mildew, such as these, and covered by “prime quality” contracts, such as this, were in fact accepted by the hop dealers (e.g., W.R. 93, 124-125, 138-139, 152-153, 241-242, 315-316, 329-330, 455-457; W. Ex. 3-W; S.R. 191; G.R. 223-224, 240-241).

*Asserted error No. 14 (Appl’s Br. 17-18, 37) to finding that upon tender and delivery the cluster hops substantially conformed to the quality provisions of the contract.* The only two objections made by appellant to the quality of the hops were, and are, to the leaf-and-stem content and the claimed “substantial damage” by mildew. The leaf-and-stem content admittedly was within the percentage allowed by the contract (ante, pp. xiv, xix). Even if appellant could assert any claim concerning the mildew (ante, pp. xxii-xxiv), the quality of the hops was not materially affected by the mildew (ante, pp. xvi, xviii-xix).

**Finding** “14. On plaintiff’s first cause of action, relating to the cluster hops, there became due and owing from defendant to plaintiff on October 31, 1947, the sum of \$8,846.52,<sup>15</sup> being the contract price

of \$11,846.52 less the advance of \$3,000.00. No part of said balance has been paid.”

*Asserted error No. 15 (Applt's Br. 18) to finding that the balance of the price of the cluster hops is due from appellant.* Appellant again asserts that, “if this contract is construed in the manner advocated by the defendant,” the balance would not be due because of the claimed defect in quality of the hops. Citations to the evidence on quality are set out ante, pp. xiv-xvi, xix-xx, xxiv-xxv.

**Finding** “15. On plaintiff's second cause of action, relating to the fuggle hops, there became due and owing from defendant to plaintiff on October 31, 1947, the sum of \$6,497.26, being the contract price of \$9,997.26 less the advance of \$3,500.00. No part of said balance has been paid.”

*Asserted error:* None.

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

HUGO V. LOEWI, INC., a Corporation,  
*Appellant,*  
v.

KILIAN W. SMITH,  
*Appellee.*

---

**REPLY BRIEF OF APPELLANT**

---

Appeal from the United States District Court for the  
District of Oregon.

---

KERR & HILL,  
ROBERT M. KERR,  
STUART W. HILL,  
Equitable Building,  
Portland, Oregon,  
*Attorneys for Appellant.*

FILED

NOV 11 1950

PAUL P. O'BRIEN,

CLERK



## SUBJECT INDEX

	Page
Statement of Case.....	1
Reply to Argument.....	3
(Numbering follows main brief of appellant)	
I. The issue of quality of the hops.....	3
The extent of the contract.....	3
Appellee's theory of "average quality".....	5
Plaintiff's theory of "merchantable".....	6
II & III. Appellant's right to reject the hops.....	6
Appellee's assertion of impossibility.....	7
Waiver and estoppel.....	7
Effect of harvesting advance.....	9
IV to VIII. Extent and form of appellee's remedy....	14



## TABLE OF CASES

	Page
Gonter v. Klaber & Co., 67 Wash. 84, 120 Pac. 533....	4
Hugo V. Loewi v. Long, 76 Wash. 480, 136 Pac. 673	4
Livesley v. Johnston, 45 Or. 30, at 48, 76 Pac. 13, 946 .....	12
Netter v. Edmunson, 71 Or. 604, 143 Pac. 636....	4
Phez Co. v. Salem Fruit Union, 233 Pac. 547, 113 Or. 398, at 429.....	9
Standard Cotton-Seed Oil Co. v. Excelsior Refining Co., 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386 .....	5
United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 78 L. Ed. 859, 54 S. Ct. 443.....	8
Wigan v. LaFollett, 84 Or. 488, at 497, 165 Pac. 579	11
Winnett v. Helvering, 68 Fed. 2d 614 (C.C.A. 9).....	8
Wolf v. Edmunson, 240 Fed. 53 .....	5

## TEXTBOOKS

3 Williston on Contracts, Rev. Ed., Sec. 688	13
6 Williston on Contracts, Rev. Ed., Sec. 1931 .....	7
6 Williston on Contracts, Rev. Ed., Sec. 1948 .....	7

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

HUGO V. LOEWI, INC., a Corporation,  
*Appellant,*

v.

KILIAN W. SMITH,  
*Appellee.*

---

**REPLY BRIEF OF APPELLANT**

---

Appeal from the United States District Court for the  
District of Oregon.

---

**STATEMENT OF CASE**

We submit that there is absolutely no basis for counsel's charges that appellant's inspection of the baled hops was not made in good faith and that the rejection was not for the reasons the appellant stated (Br. 23, XV). The record shows that the inspection was made in the manner normal to the trade, and that the samples

on which the rejection was based actually showed the mildew damage for which the appellant rejected the hops (Tr. 123, 181, 186, 282, 290, 291).

The record clearly shows that the rejection of the entire lot of hops was not decided merely upon examination of the first preliminary sample, as counsel infer. The appellant's telegram of September 16, 1947 to Mr. Paulus (Ex. 17) is amplified and explained by its letter to Mr. Paulus of the same date (Ex. 16) stating that "we will not accept such hops", obviously referring to such of the hops as would grade no better than that sample. Mr. Oppenheim testified such was his intent, and Mr. Paulus so construed the instructions (Tr. 315, 250). As soon as the appellant was advised that these first samples might not be representative of the entire lot, it instructed Mr. Paulus to obtain representative tenth bale samples, on the basis of which the hops were rejected (Tr. 299).

It is undisputed that when these hops were rejected there was an actual scarcity of prime quality cluster hops and that the market for such hops remained high (Geschwill Tr. 475, 476). Rejection of hops by the appellant in 1947 forced it to replace such hops on the open market to fill its brewer commitments (Geschwill Tr. 440, 437, 453).

Finally, counsel's challenge of the appellant's good faith is conclusively refuted by the appellant's offer to buy the appellee's surplus fuggle hops at 91¢ per pound to replace the rejected 84¢ cluster hops (Tr. 231, 241, 242).

Counsel's statement that the market "had adjusted to the mildew" by establishing a 5¢ per pound premium for the mildew-resistant fuggles (Br. 19) expresses merely counsel's own conclusion unsupported by the record. The record does not reveal any relation between that price differential and the mildew-resistant characteristic of the fuggles. Such relationship certainly is not indicated merely by Mr. Oppenheim's testimony cited by counsel.

## ARGUMENT

For convenience of the court, the discussion herein of appellee's argument is grouped under the appropriate numbered headings of the appellant's original brief.

### I

The appellee argues (Br. 28) that the appellant cannot claim a warranty. The appellant's case is not dependant upon any warranty or breach of warranty. The appellant's defense to the appellee's action for the contract price is that the appellee failed to deliver merchandise of the quality called for by the contract.

Counsel's attempt to construe the contract as a purchase of the "entire crop" on the vines (Br. 28, 29, VIII) disregards the unambiguous language and obvious intent of the contract. The "sales slip" referred to by counsel (Ex. 2) obviously is merely a memorandum which was superseded by the subsequent contract on

which the appellee bases this action (Tr. 3, 1-18, 108, 146, 195). The appellant contracted to buy only such of the crop as met the contract's express description when processed and baled.

*Hugo V. Loewi v. Long*, 76 Wash. 480, 136 Pac. 673, is not in point. There no subsequent contract was executed to replace the letters and telegrams which expressed the agreement.

*Gonter v. Klaber & Co.*, 67 Wash. 84, 120 Pac. 533, involved a contract to buy the grower's entire crop then baled. The contract contained no further description of the hops. This was clearly a sale of existing specific goods and bears no similarity to the contract here involved.

Mr. Oppenheim's testimony did not put in issue the brewing value of the appellee's hops and thus open the door, as counsel contend (Br. 21), to the evidence of chemical content which *Netter v. Edmunson*, 71 Or. 604, 143 Pac. 636, holds is immaterial in determining contract quality of hops. The Oppenheim testimony cited by counsel is simply that some brewers may make laboratory tests of their hops to determine the quantity required for each brew (Tr. 322). This is in no way connected with the issue of standard of quality as applied in the contract between the grower appellee and the dealer appellant.

Here, as in the *Geschwill* case, the appellee is forced to rely upon something less than complete conformance with the contract description of the hops. He contends there was "substantial" performance, that his hops were



equal in quality to the 1947 Willamette Valley “average”, and were “merchantable”. Inasmuch as counsel adopt by reference much of their argument on these subjects in appellee Geschwill’s brief, our reply thereto, pages 4 to 7 of the reply brief in the Geschwill case, is incorporated herein by this reference.

*Wolf v. Edmunson*, 240 Fed. 53, cited on pages 21 and XIX of appendix of appellee’s brief, is no authority for the appellee’s contention that tender of “merchantable” hops was sufficient without compliance with the contract’s express description. There was testimony in that case relative to the chemical value of the hops. The court approved the trial court’s instruction to the jury that in considering whether or not the hops were of the quality required by the contract, the chemical value of the hops was not a controlling test, and that the jury must consider the value of the hops in the market rather than their inherent or chemical value, inasmuch as the contract was made with the market value in view.

The absurdity of the “average quality” theory is demonstrated by comparison of the Geschwill and Smith versions of 1947 “average quality”. The Geschwill hops, with 5% mildew, are described as a “good, average crop” (Geschwill Tr. 223). The hops of appellee Smith, with 50% mildew, likewise are described as “average” for that year (Tr. 182).

*Standard Cotton-Seed Oil Co. v. Excelsior Refining Co.*, 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386, cited by counsel (Br. 26), does not support the proposition that a contract for “prime” quality is satisfied by

tender of "prime of the season". The court there decided merely that the tendered oil was in fact of contract quality.

Counsel's description of the contracted hops as "prime quality 1947 hops showing some mildew" (Br. 26) is meaningless. The presence or extent of mildew is not the issue. Failure of the tendered hops to meet the contract description is not attributed merely to the presence of some mildew, but to the results thereof—the immaturity of the hops, their unsound condition, lack of good color, and failure to constitute prime quality.

Mr. Cornoyer, appellee's witness, did not, as the discussion on page 20 of appellee's brief would indicate, limit his testimony to discussion of prime quality in prior years. He described the samples of appellee's hops as showing mildew and stated that the color caused by such mildew is not a "good color". A complete reading of his testimony makes it clear that in his expert judgment the appellee's hops could not have graded prime quality for 1947 or any year (Tr. 180-186).

## II and III

The appellant contracted for hops of a certain express description, that is, hops of prime quality, fully matured, of good color and in sound condition. The hops tendered did not meet that description, so there was a plain failure of consideration.

There is no evidence that it was impossible for the appellee to produce and tender some hops which would

have met the contract requirements. Difficulty does not necessarily amount to impossibility. 6 *Williston on Contracts*, Rev. Ed., Sec. 1931.

Furthermore, the appellee's assertion of impossibility is not for the purpose of relieving him of any performance, but is an attempt to force the buyer to take, at full contract price, less than it bargained for. Inasmuch as the appellee knew of mildew in his yard when he executed the contract and nevertheless expressly agreed to deliver hops of a certain description, he clearly thereby assumed the risk of being able to deliver hops of that description. 6 *Williston on Contracts*, Rev. Ed., Sec. 1948. His experience as a hop dealer before going into the business of growing hops must have made him keenly aware of the obligations and risk which he assumed (Tr. 95, 143).

The appellee's argument relative to waiver and estoppel arising from the appellant's knowledge of mildew in the growing crop disregards the fact that there is no finding or conclusion by the trial court of waiver or estoppel, nor any finding from which such may be implied. The trial court expressly found that the appellee duly performed all of the terms and conditions of the agreement on his part to be performed (Finding 8, Tr. 51). This amounts in effect to a finding that there was no waiver or estoppel, for if the appellee fully performed, then there could have been no reliance upon the claimed acts of the appellant and hence no basis for waiver or estoppel. The authorities cited on pages 11 and 12 of the reply brief in the *Geschwill* case are equally in point here and by this reference are herein incorporated.

In view of the express finding of complete performance, there can be no implied finding of waiver or estoppel, for such would result in an inconsistency of findings which would require a reversal of the judgment. *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 78 L. Ed. 859, 54 S. Ct. 443. *Winnett v. Helvering*, 68 Fed. 2d 614 (C.C.A. 9).

Furthermore, there is no finding of the essential elements of waiver and estoppel, as set forth in the appellant's reply brief in the Geschwill case, pages 10 to 12, which are by this reference incorporated herein. Neither Finding 5 (Tr. 50) nor Finding 7 (Tr. 51), relied upon by the appellee's argument, separately or in combination, cover those essential elements. The issue of fact involved is not whether or not there was some or any mildew in the hops. The question is whether or not the hops as tendered by the appellee were of prime quality, fully matured, in sound condition, not affected by mold, of good color, and otherwise in compliance with the contract description. Certainly the trial court did not find, expressly or by implication, that any of these contract requirements were waived or that the appellant is estopped from relying thereon.

Furthermore, there is no substantial evidence which would support any finding of waiver or estoppel.

The authority of Mr. Paulus and Mr. Fry to deal with appellee did not include any authority to change or waive any provision of the written contract or to accept any hops for the appellant while on the vines or at any time prior to their tender in bales (Tr. 206, 216, 224,

229, 292). The trial court made no finding of any such authority. An agent's authority is measured and determined, not by his acts, but by those of his principal. *Phez Co. v. Salem Fruit Union*, 233 Pac. 547, 113 Or. 398, at 429.

The appellee's effort to establish waiver or estoppel excusing him from compliance with the written contract centers around the contention that Mr. Fry "instructed" the appellee to continue harvesting, and also "elected" to make the harvesting advance, then knowing that the crop had mildew (Br. 31).

It is uncontroverted that at that time substantial quantities of the hops were free from mildew. The appellee then estimated that 50% of the crop was not affected by mildew and would meet contract requirements (Tr. 151, 196, 197). The harvest advance was figured on that basis (Tr. 113).

It is also uncontroverted that at that time Mr. Fry warned the appellee against picking mildewed hops, advised him to do the best he could, and to skip as many mildewed hops as he possibly could, and that it was understood by the two men that such would be done (Tr. 148, 152, 153, 149, 198). These statements by Mr. Fry are the only basis for the appellee's contention and the court's finding that the appellant "instructed" the appellee to continue picking the hops (Finding 7, Br. 51).

To what extent did the appellee comply with these "instructions"? According to his own testimony, he simply advised his pickers "to let the worst ones hang".



He did not even instruct the pickers to attempt to avoid the mildewed hops. He was content merely to rely upon the pickers' natural tendency to pick the heavier hops (Tr. 102, 134, 148, 153, 152). He left only 25% of the crop unharvested, although he knew that a full 50% of the crop was mildewed (Tr. 133, 151).

The baled hops showed this failure by the appellee to make even a reasonable effort to meet the contract requirements. Accurate representation of the entire lot by the samples in evidence is not questioned by the appellee. These samples, which speak for themselves, establish clearly the failure of the hops to comply with the contract description.

The warnings by Mr. Fry against picking mildewed hops, hereinabove referred to, were given when he was in the appellee's hop yard to deliver the harvest advance payment which the appellee had called for. The amount of that advance was increased from the \$2,500.00 specified in the contract to \$3,000.00 at the appellee's request because of increased wage rates demanded by the pickers. It is significant that at that time Mr. Fry insisted on using the 50% of the crop which the appellee estimated to be free from mildew, or 50 bales, as the basis for computing the amount of that harvesting advance (Tr. 110-113).

This advance payment in no way obligated the appellant to accept whatever hops might thereafter be processed, baled and tendered under the contract. The appellant had expressly reserved in the contract the right of subsequent inspection of the baled hops and rejection

of any hops not of the "quality, character and kind" described in the contract. As stated by the court in *Wigan v. LaFollett*, 84 Or. 488, at 497, 165 Pac. 579, the purpose of such contract provision for inspection and rejection is "to provide for the acceptance of such part of the crop raised as is of the quality specified in the contract and for the rejection of the balance."

The obligation under the contract of the buyer to advance harvesting money, and the provision for discharge of the buyer from that obligation if the hops to be harvested are not in such condition as to produce the quality called for under the contract, are entirely separate from the contract provision for ultimate inspection by the buyer of the baled hops with right of rejection. The provision for possible discharge of the buyer's obligations to make harvesting advances obviously is for the benefit and protection of the buyer. The appellant buyer could avail itself of that protection, or forego it, as it saw fit.

Furthermore, the appellant could escape from the contract obligation to make the harvest advance only if the hops were "not in such condition so as to produce the quality of hops called for" by the contract (Ex. 1, Tr. 13). The harvest advance of \$3,000.00 was made when substantial quantities of mildew-free hops were apparent on the vines and which the appellee estimated at 50 bales, or 10,000 pounds. The amount of that advance was computed on the basis of a harvest cost of 30¢ per pound of that estimated quantity of contract quality hops (Tr. 103, 113, 114). Under these circumstances the contract provision for discharge of the ap-

pellant from the obligation to make the picking advance could not have come into operation.

Counsel's quotation (Br. 30) from the opinion of the court in *Livesley v. Johnston*, 45 Or. 30, at 48, 76 Pac. 13, 946, has been pulled out of its proper context and does not apply to the contract or circumstances here involved. That was a buyer's suit for specific performance of a grower's hop sale contract. The contract provided for picking advances to be paid by the buyer unless the buyer "shall determine" that the growing crop is not in proper condition. The defendant argued there was no contract for lack of mutuality, as under this provision the buyer was free to choose whether or not to make an advance and thus bound himself to nothing. The court held that in determining whether or not to advance the picking funds the buyer was obligated to exercise an honest judgment as to whether or not the crop was in proper condition, thus providing the essential mutuality.

In this case the contract provision is absolute, and permitted no exercise of judgment by the appellant with respect to whether or not the growing hops would produce hops of contract quality and the harvest advance thus be or not be required.

The court in the *Livesley* case analyzed and discussed not only the contract provisions relative to the buyer's right to withhold picking advances if the crop was not in proper condition, but also contract provisions relative to the buyer's subsequent right to inspect and reject the baled hops. It is clear that the court con-

sidered the provisions for inspection and possible rejection as separate from and not conditioned upon operation of the provisions relative to the making or withholding of picking advances.

The appellee has cited no instance and we know of none, among the many cases involving hop sale contracts, where a court has held or even intimated that the making of a hop harvesting advance by the buyer in some way precludes the buyer from thereafter asserting and relying upon his contract right to inspect the baled hops and reject those not of contract quality.

An impossible situation would result from a ruling that the making of a picking advance by a hop buyer at a time when there is possible doubt as to what quantity of contract quality hops will be produced, precludes the buyer's inspection and rejection of hops not of contract quality. Any hop buyer under contract to make such harvest advances would face the dilemma of either making the advances and being forced to accept at full contract price whatever hops were harvested and properly dried, cured and baled, or refusing to make such advances and thus incur possible liability for extremely heavy damages resulting to the grower from his inability otherwise to finance the harvest. It is obvious that such a situation is not intended by these contract provisions.

Counsel's quotation from 3 *Williston on Contracts*, Rev. Ed., Sec. 688 (Br. 31) is not applicable. Here there was no election by the appellant to continue under the contract after a known excuse. Further, the parties

here expressly agreed that the appellant buyer should have a subsequent right of inspection and rejection, which amounts, within the meaning of *Williston*, to a retention by the appellant of any excuse arising from failure of the hops to meet contract quality.

#### IV to VIII

Inasmuch as the appellee has adopted by reference its argument applicable to these headings in the Geschwill case (Br. 33), we incorporate by this reference the material in the reply brief in the Geschwill case, pages 13 to 20.

Respectfully submitted,

KERR & HILL,

ROBERT M. KERR,

STUART W. HILL,

Attorneys for Appellant.



**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

HUGO V. LOEWI, INC., a Corporation,  
*Appellant,*

v.

KILIAN W. SMITH,  
*Appellee.*

---

**PETITION FOR REHEARING AND**  
**BRIEF IN SUPPORT THEREOF**

---

Appeal from the United States District Court for the  
District of Oregon.

---

KERR & HILL,  
ROBERT M. KERR,  
STUART W. HILL,  
*Attorneys for Appellant.*



## SUBJECT INDEX

	Page
Petition for Rehearing.....	1
Certificate of Counsel.....	2
Brief in Support of Petition for Rehearing.....	3
Argument .....	3
I. Issue on Quality.....	3
The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.	
II. Measure of Damages.....	9
The court erred in deciding that the re- spondent is entitled to maintain this action for the price of the hops under the pro- visions of Section 64(2) of the Uniform Sales Act, Section 71-164(2), O.C.L.A.	
III. Liquidated Damages .....	13
The court erred in refusing to apply the measure of damages specified in the con- tract.	
Conclusion .....	13

## TABLE OF CASES

	Page
S. S. Steiner, Inc. v. Hill, 52 Or. Adv. 57, 226 P. 2d 307 .....	7
Stevenson v. Puget Sound Vegetable Growers' Assn., 172 Wash. 196, 19 P. 2d 925.....	11

## STATUTES

### IN

## OREGON COMPILED LAWS ANNOTATED

O.C.L.A., Section 71-163(1), Section 63(1) Uniform Sales Act .....	10
O.C.L.A., Section 71-163(3), Section 63(3) Uniform Sales Act .....	10
O.C.L.A., Section 71-164(2), Section 64(2) Uniform Sales Act .....	2, 9, 10, 11, 12
The Uniform Sales Act.....	9

## TEXTBOOKS

4 Williston on Contracts, Section 972.....	6
--	---

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

HUGO V. LOEWI, INC., a Corporation,  
*Appellant,*

v.

KILIAN W. SMITH,  
*Appellee.*

---

**PETITION FOR REHEARING**

---

Appeal from the United States District Court for the  
District of Oregon.

---

TO THE HONORABLE, THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT:

Comes now Hugo V. Loewi, Inc., a corporation, and  
respectfully petitions this honorable court for a rehearing  
in accordance with the rules and practice of this court,  
on the following grounds:



- I. The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.
- II. The court erred in deciding that the respondent is entitled to maintain this action for the price of the hops under the provisions of Section 64(2) of the Uniform Sales Act, Section 71-164(2), O.C.L.A.
- III. The court erred in refusing to apply the measure of damages specified in the contract.

KERR & HILL,  
ROBERT M. KERR,  
STUART W. HILL,  
Attorneys for Appellant.

### **CERTIFICATE OF COUNSEL**

I, Stuart W. Hill, one of the attorneys of record for the appellant on this appeal, hereby certify that in my opinion the petition for rehearing is well founded and that it is not interposed for delay.

STUART W. HILL,  
One of the Attorneys for Appellant.

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

### ARGUMENT

#### I.

#### ISSUE ON QUALITY

The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.

The court concluded that the hops tendered did conform to the quality called for by the agreement, for these reasons:

##### 1.

“ \* \* \* both at the time the contract was executed and at the time the ‘picking advance’ was made appellant through its representative had knowledge of the mildewed condition of the hops.”

This statement is correct, as it is assumed that the court is referring to the hops while they were still on the vines. It cannot be emphasized too strongly, of course, that this was a contract of sale of a processed product: hops which were harvested, dried, cured and baled.

The court continued:

“In regard to the knowledge of appellant at the time the contract was executed the court found:

“ ‘Before entering into said cluster hop agree-

ment defendant (appellant) inspected said cluster hop crop and defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled.'

"Appellant admits that the first part of this finding is true but denies that the second part is supported by any substantial evidence. We do not agree. There is evidence in the record that not all of the hops were picked; that appellee and his pickers made every effort to avoid mildewed hops; and that selective picking of hops is impractical. The finding of the trial judge is in our view supported by substantial evidence."

There is no evidence in this record to support the court's expression that "appellee and his pickers made every effort to avoid mildewed hops." In fact, all the evidence points to the opposite conclusion: they made no reasonable or substantial effort to avoid such hops.

The following statement in the appellant's brief, page 8, was unchallenged by the appellee:

"The plaintiff admittedly made no earnest effort to avoid harvesting mildewed hops. He acknowledged that he harvested and baled all but 25 per cent of the cluster crop (Tr. 133) despite the fact that 50 per cent of the crop was mildewed (Tr. 103). He did not cut down any of the vines of mildewed hops ahead of the pickers in order to avoid the harvesting of those hops (Tr. 134, 135). He simply told his pickers 'to let the worst ones hang,' with the result that the pickers did pick mildewed hops, and 'just skipped those that were real badly infected' (Tr. 134)."

The only comment by the appellee was this, page 16:

"Picking on the clusters began about August 25th and continued until about September 3rd

(S.R. 110). Not only did Mr. Smith instruct his pickers to skip the badly mildewed vines and branches (S.R. 134), but they did so on their own volition because, as he said (S.R. 149):

“‘after all, they were looking for the big hops, nice clusters, because that is what makes weight in their baskets.’”

The court then made this statement:

“There is evidence in the record \* \* \* that selective picking of hops is impractical.”

The only evidence in support of that finding is that it would have been more expensive to pick the hops one by one to avoid those which were mildewed. The appellee could have cut down the vines on which the hops were badly infected, and certainly could have picked far more selectively than to “just skip those that were real badly infected.” If the pickers skipped those which were “real badly infected,” they could just as easily have skipped in addition those which were infected at all.

If this is true, it must be clear that the hops would not “in normal course,” or inevitably, show “such mildew” when picked and baled.

From this it follows that selective picking was not impossible nor impractical, as this is the only conclusion which can be drawn from the appellee’s testimony to which reference was made in the quotation from the appellant’s brief, page 8.

The appellant therefore had a clear right to assume that the appellee could and would take such precautions

as were necessary to make certain that the baled hops would meet the contract specifications.

From time immemorial growers have had to assume the risk of crop failures (Geschwill brief, 26). It is equally true that a manufacturer or producer who undertakes to meet certain contract specifications, assumes the risk of a possible failure to do so (Geschwill brief, 41 to 45).

## 2.

"We feel that the finding of the trial court that appellant did not rely on any warranty that the hop crop would be in any different condition than it actually was when delivered is a more reasonable and logical explanation of the intention of the parties."

This finding is based entirely on speculation as there is no evidence to support it. These parties entered into a contract by which the appellant agreed to buy all baled hops from the appellee which were grown on his land and which, when baled, would meet certain contract specifications. This contract was neither impossible nor impractical to perform and the appellant had the undoubted right to assume and did assume that it could and would be performed.

Furthermore, it is well settled that the execution of a contract containing a warranty by the other party constitutes a reliance upon that warranty. 4 Williston on Contracts, Section 972. See Geschwill reply brief, page 8.



One important factor was not taken into account by the court: the appellant was given the right in the contract to reject all baled hops which did not meet the description stated therein. This clause is a strong expression of intention that the appellant could and would reject the appellee's hops if they did not meet the description. Accordingly, this clause was a distinct warning to the appellee that his hops would be rejected if they were not of contract quality. As such, this clause constitutes the clearest evidence of intention, when the contract was signed, that the appellant relied upon the warranty.

## 3.

“ \* \* \* the making of the picking advance under such circumstances is evidence having some weight that appellant received the quality of hops it bargained for.”

This statement was made by the court while discussing the case of *S. S. Steiner, Inc. v. Hill*, 52 Or. Adv. 57, 226 Pac. 2d 307, decided on Jan. 17, 1951, and the question of waiver.

The advance was made by the appellant to enable the appellee to harvest his hops and dry, cure and bale them. As previously stated, the appellant had the undoubted right to assume that the appellee would comply with the terms of the contract and would harvest, dry, cure and bale hops, and only those, which would meet the contract specifications. It was neither impossible nor impractical for the appellee to do so.

How can it possibly be said that the making of the

advance was evidence that "appellant received the quality of hops it bargained for?" When the advance was made the appellant did not know which hops would be picked.

Actually, 50% of the hops in the appellee's yard were infected by mildew and 50% were free of it. The appellee picked 75% of the hops. If he had been even more heedless than he was and picked 100% of his hops, could it still be said that the making of the advance was evidence that "appellant received the quality of hops it bargained for?"

The making of the advance occurred first and could not possibly be evidence of what took place later.

This case was tried by both parties in exactly the same manner as the *Geschwill* case and all that is said in the brief supporting the petition for rehearing in that case, under this heading, is applicable here and is incorporated herein. The conclusion which is established by that argument is that the hops tendered to the appellant by the appellee Smith did not meet the description in the contract, and that there is no evidence that they did.

The *Steiner* case establishes conclusively that there was no waiver of the quality provisions of the contract in the present case by reason of the execution of the contract or the making of the advance.

While it is true that the trial court made no express finding of waiver in the present case, some of the findings of fact do convey the idea that the trial court had

the concept of waiver in mind and may have been influenced by it.

Waiver and estoppel are considered in some detail in the Geschwill reply brief, pages 10 to 12. This argument was incorporated into the Smith reply brief, page 8. This argument was made in answer to contentions of the appellee that the doctrine of waiver and estoppel were applicable here.

## II. MEASURE OF DAMAGES

**The court erred in deciding that the respondent is entitled to maintain this action for the price of the hops under the provisions of Section 64(2) of the Uniform Sales Act, Section 71-164(2), O.C.L.A.**

The court held that the appellee was entitled to maintain this action for the price of the hops, and refused to sustain the appellant's contention that the only recovery permitted by the Uniform Sales Act was the difference between the contract price and the market value.

The court gave this reason for its decision:

“Our view is that the measure of damages applied by the trial court was proper.<sup>5</sup> \* \* \* 5. See discussion of this issue in *Loewi, Inc. v. Geschwill*, No. 12,440, decided this day.”

The decision of the court in the Smith case is clearly erroneous, if the decision of the court in the Geschwill

case on the measure of damages is acknowledged to be correct, as the court in the Smith case failed to take into account one feature of the greatest importance which distinguishes these two cases:

In the Geschwill case, the appellee resold his hops, and gave the appellant credit for the amount received on the resale.

In the Smith case, the appellee did not resell his hops and of course gave the appellant no credit of that kind.

The importance of this distinction lies in this:

The court, in its opinion in the Geschwill case, adopted as the measure of damages in that action, the difference between the contract price and the amount received on the resale of the hops.

In doing so, the court stated that this recovery was justified under Section 64(2) of the Act, Section 71-164(2), O.C.L.A. The court held that the difference between the contract price and the amount received on the resale, was "the loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract," within the meaning of Section 64(2) of the Act.

In this Smith case, however, there was no resale of the hops prior to the trial, and of course there is no record of any resale thereafter.

So far as this record shows, however, there may have been a resale and the appellee may have received a substantial sum for his hops, for which no credit can be

given to the appellant. This is pointed out to demonstrate that the measure of damages adopted by the court in the Geschwill case is wholly inappropriate here, as there is no evidence here with respect to one of the chief elements of the measure of damages adopted by the court in the Geschwill case: the amount received on the resale, if there was such a sale.

In this Smith case, there is no possible basis for permitting a recovery under Section 64(2) of the Act, due to the fact that there has been no resale of which the court has been apprised, nor any evidence that the appellee's hops were worthless at any time.

The case of *Stevenson v. Puget Sound Vegetable Growers' Assn.*, 172 Wash. 196, 19 P. 2d 925, can have no possible application to the present case, as the evidence in that case demonstrated conclusively that the peas which were the subject of the contract, died on the vine and became wholly valueless. In the present case there is no such evidence.

There is, in fact, a complete absence of evidence of the condition or value of the plaintiff's hops at any time after 1947. Nor is there any evidence of what disposition was made of them, or what was received for them if they were resold.

There is therefore a complete failure of proof with respect to one of the elements of the measure of damages adopted by the court in the Geschwill case. We know the contract price, but there is no means of determining from the evidence whether any amount should



be deducted from that price, and if so, what amount must be deducted.

Stating this proposition in another way, there is no evidence in this record tending to establish that the contract price, without deduction, was "the loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract," within the meaning of Section 64(2) of the Act.

This is therefore an action for the price pure and simple and the only portion of the Act which can have any application whatever is Section 63.

There can be no recovery of the price under Section 63(3) because of the considerations set forth in the original Geschwill brief, pages 47 and 48, which were incorporated into the original Smith brief, page 40.

Nor can there be any recovery of the price under Section 63(1) for the reasons set forth in the original Geschwill brief, pages 48 to 61, which were incorporated into the original Smith brief, pages 40 to 42.

We wish to stress the rule that there can be a recovery of the price only when authorized by Section 63 of the Act. This is established by the three cases cited on pages 46 and 47 of the Geschwill brief which were incorporated into the Smith brief, at page 39.

Here Section 63 does not authorize a recovery of the price for the reasons which have been fully discussed in the previous briefs at the pages mentioned.

### III.

## LIQUIDATED DAMAGES

**The court erred in refusing to apply the measure of damages specified in the contract.**

In rendering its decision the court simply said:

“The contract in the instant case contained the same ‘liquidated damages’ clause as the case of *Loewi, Inc. v. Geschwill*, decided this day. What we said in that case is equally applicable here.”

The appellant accordingly incorporates herein the argument set forth under this heading in the brief filed in the *Geschwill* case in support of the petition for rehearing filed contemporaneously herewith.

## CONCLUSION

The appellant respectfully contends that there is clear error in the decision of the court in the three particulars considered herein, and requests a rehearing in order that this can be demonstrated beyond doubt.

Respectfully submitted,

KERR & HILL,

ROBERT M. KERR,

STUART W. HILL,

Attorneys for Appellant.















